

REPORT DOCUMENTATION PAGE

AD-A270 358



Form Approved
OMB No. 0704-0188



is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and reviewing the collection of information, and comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.

REPORT DATE
Sep 1993

3. REPORT TYPE AND DATES COVERED
THESIS/DISSERTATION

4. TITLE AND SUBTITLE

The Role of States in Cleanup of Hazardous Waste at Federal Facilities

5. FUNDING NUMBERS

6. AUTHOR(S)

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7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)

AFIT Student Attending: The George Washington Univ

8. PERFORMING ORGANIZATION REPORT NUMBER

AFIT/CI/CIA-93-129

9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES)

DEPARTMENT OF THE AIR FORCE
AFIT/CI
2950 P STREET
WRIGHT-PATTERSON AFB OH 45433-7765

10. SPONSORING / MONITORING AGENCY REPORT NUMBER

DTIC
ELECTE
OCT 06 1993
SEED

11. SUPPLEMENTARY NOTES

12a. DISTRIBUTION / AVAILABILITY STATEMENT

Approved for Public Release IAW 190-1
Distribution Unlimited
MICHAEL M. BRICKER, SMSgt, USAF
Chief Administration

12b. DISTRIBUTION CODE

13. ABSTRACT (Maximum 200 words)

93-23215



14. SUBJECT TERMS

15. NUMBER OF PAGES

88

16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT

18. SECURITY CLASSIFICATION OF THIS PAGE

19. SECURITY CLASSIFICATION OF ABSTRACT

20. LIMITATION OF ABSTRACT

The Role of States in Cleanup of Hazardous Waste at Federal Facilities

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A Thesis submitted to

The Faculty of

The National Law Center

**of The George Washington University
in partial satisfaction of the requirements
for the degree of Master of Laws**

September 30, 1993

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Accession For	
NTIS CRA&I	<input checked="checked" type="checkbox"/>
DTIC TAB	<input type="checkbox"/>
Unannounced	<input type="checkbox"/>
Justification	
By	
Distribution /	
Availability Codes	
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A-1	

DTIC QUALITY INSPECTED

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THE ROLE OF STATES IN CLEANUP OF HAZARDOUS WASTE AT FEDERAL FACILITIES

America is not stronger if our natural resources are poisoned in the process. We can manage [federal] facilities to protect both the environment and our Nation's security.-Congressman Wyden¹

Ultimately, Federal facilities cannot be treated like private parties because they cannot be what they are not. They are Federal entities with national missions and they are funded and controlled by Congress. Last year DoD alone was subject to statutory guidance exceeding 300 pages. DoD does not turn a profit and the taxpayers have the last word on its operating budget. Congress is a tough enough master without delegating its authority to a multitude of state and local regulatory agencies who are not sensitive to cost and do not have responsibility for national defense. I fear we are approaching the point where nobody is going to be in charge because everybody is in charge.-Congressman Ray²

INTRODUCTION

In this paper I will look at the role of states in hazardous waste/constituent/substance³ cleanup at federal facilities, a role defined by Congress and implemented by federal agencies. Two questions underlie this paper: what law applies to federal facilities and who is responsible for enforcing that law. As I look at those

¹*Cleanup at Federal Facilities: Hearings on H.R. 3781, H.R. 3782, H.R. 3784, and H.R. 3785 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce, 100th Cong., 2d Sess. (1988).*

²*Environmental Compliance by Federal Agencies: Hearings on H.R. 1056 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. (1989).*

³These are all terms of art. Hazardous waste is the subject of Subtitle C of the Solid Waste Disposal Act, better known by its 1976 amendment, the Resource Conservation and Recovery Act (RCRA). A hazardous constituent is used in RCRA § 3004(u), which is one of the RCRA corrective action sections with which I will deal with later in this paper. Finally, hazardous substance is the term used in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

questions three themes and two federal laws emerge. The themes are 1) the growing environmental concern in this country, 2) the move on the part of the federal government to respond to that concern by entering the field of pollution control, an area of local concern, to apply a national minimum standard but allow the programs to be primarily subject to state control, and 3) federal facility compliance with the evolving pollution control laws, focusing on the relationship of federal facilities to the states. The two laws examined are the Solid Waste Disposal Act,⁴ better known by the name of its 1976 amendment, the Resource Conservation and Recovery Act (RCRA),⁵ and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended.⁶ I will trace their evolution, including versions that were considered and rejected, to better understand the policy decisions Congress made in defining the role of the states.

This paper will examine how EPA and DoD reacted to the laws Congress passed and how the courts have interpreted what the other two branches of the federal government have done. It will look at the constitutional arguments against the laws that Congress has passed. The overlap of RCRA corrective action⁷ and CERCLA will be

⁴42 U.S.C.A. §§ 6901-6992k (1983 & West Supp. 1993).

⁵Pub. L. No. 94-580, 90 Stat. 2795 (1976).

⁶42 U.S.C.A. §§ 9601-9675 (1983 & West Supp. 1993).

⁷By corrective action I mean action under the State counterpart of RCRA § 3004(u)-(v), 42 U.S.C. § 6924(u)-(v), which will be described in greater detail later in this paper. This is consistent with what EPA means when it talks of "corrective action authorization." There are currently 16 states with corrective action authorization and one state with interim corrective action authorization, though for some states this only means delegation of authority under § 3004(u).

evaluated to show that the states have gone from being bystanders to having the responsibility to oversee federal facility compliance with hazardous waste cleanup laws.

POLLUTION CONTROL: A PREDOMINANTLY LOCAL CONCERN

Pollution control was originally a purely local concern, a traditionally state area of control using the police power to protect the health and safety of its citizens. Regulation of pollution goes back hundreds of years.⁸ As our society has become more complex and population has increased, pollution problems have become more pervasive. The inability of local governments to deal with pollution led states, and later the federal government, to enter the field.

Before 1970 it was easy for industries to avoid pollution control regulation. They could locate in an area that did not regulate them, or they could threaten the local and state politicians that they would move to a more hospitable climate for business if tough pollution standards, that affected them, were enacted.⁹ At that time there was not much "environmental concern," except for a few lonely voices in the wilderness and a few officials at the state and local levels who tried to enforce the limited pollution control requirements that did exist. Attitudes began to change in the 1960s when public support for the environment "exploded."¹⁰ It culminated with the establishment of the first Earth

⁸U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA HISTORICAL PUBLICATION-1, THE GUARDIAN: ORIGINS OF EPA 3 (1992)[hereinafter THE GUARDIAN]. See also, ARNOLD W. REITZE, JR., ENVIRONMENTAL REMEDIES 1, 31-40 (1993).

⁹U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA HISTORY PROGRAM: ORAL HISTORY INTERVIEW-1, U.S. ENVIRONMENTAL PROTECTION AGENCY ADMINISTRATOR: WILLIAM D. RUCKELSHAUS 5 (1993)[hereinafter RUCKELSHAUS].

¹⁰*Id.* at 7.

Day on 22 April 1970 and the creation of the United States Environmental Protection Agency (EPA) on 4 December 1970.¹¹ The agency was formed primarily because of public demand.¹² Before the formation of the EPA there were not many federal laws concerning pollution control and only limited enforcement of those laws by the federal government.¹³ The federal government's involvement in pollution control was to provide minimum national standards. The task of EPA was to establish overall standards and enforcement, and delegate back to the states the administration of those programs when satisfied that the states could manage them. EPA retained the authority to take the programs back from the state if they failed to administer them properly. EPA was the "gorilla in the closet."¹⁴ The purpose was not to usurp state authority but to facilitate it, to make state programs more effective.

FEDERAL FACILITIES AND POLLUTION CONTROL

The federal government is not only a regulator in the environmental field it is also a regulatee. One estimate places the number of contaminated federal sites at 20,000 on

¹¹Reorganization Plan Number 3, dated 9 July 1970, set forth President Nixon's plan to establish EPA. Hearings were held in Congress during the Summer of 1970 on this plan. EPA "cleared all its statutory hurdles" on 2 December 1970 and started operations on the 4th with Mr. William D. Ruckelshaus as its first administrator. *See generally*, THE GUARDIAN, *supra* note 8, at 11-13 and RUCKELSHAUS, *supra* note 9, at v.

¹²RUCKELSHAUS, *supra* note 9, at 7. Mr. Ruckelshaus goes on to say, "Public opinion remains *absolutely essential* for anything to be done on behalf of the environment. Absent that, nothing will happen because the forces of the economy and the impact on people's livelihood are so much more automatic and endemic."

¹³*Id.* at 8.

¹⁴*Id.*

nearly 2,000 military bases and Energy Department facilities.¹⁵ The cost to clean up these sites is estimated at over \$200 billion.¹⁶ This is only speculative, however, because the technology is not always available to clean up some of the hazardous wastes that have been generated. No one really knows the total cost of cleanup.¹⁷

A person responsible for cleaning up contaminated sites at a federal facility needs to know what the law is and who is responsible for enforcing it. The answers have been evolving for over two decades as Congress has tried to impose federal facility compliance with environmental laws. The evolution of the law in the area of hazardous waste cleanup has led to inconsistent and overlapping requirements.

There are three choices of whom to give oversight or enforcement authority over federal facilities: the federal agency that caused the problem, an independent federal agency, or the state (or local) government. The third possibility raises issues of federalism including the thorny question of sovereign immunity. Under the supremacy clause,¹⁸ "the activities of the Federal government are free from regulation by any

¹⁵Kenneth P. Doyle, *Cleaning Up Federal Facilities: Controversy Over an Environmental Peace Dividend*, ENVTL. L. REP. 2660 (Feb. 5, 1993). DoD and DoE account for a majority but not all federal hazardous waste sites.

¹⁶General Accounting Office, GAO/T-RCED-92-82, *Testimony of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, on Federal Facilities: Issues Involved in Cleaning Up Hazardous Waste* 4 (1992).

¹⁷*Id.* at 5.

¹⁸U.S. CONST. art. VI, cl. 2.

state."¹⁹ Turning to what law to apply, the choices are federal, state, local, or a mixture of these.

The first approach Congress used in dealing with federal facility compliance was the cooperative approach. It required federal facilities to cooperate with federal and state regulators "to the extent practicable and consistent with the interests of the United States,"²⁰ allowing them to oversee their own cleanup. By 1970 Congress found the voluntary approach did not work. Members of Congress stated, "'[i]nstead of exercising leadership in controlling or eliminating air pollution' 'Federal agencies have been notoriously laggard in abating pollution.'"²¹ In an attempt to solve this problem, Congress made federal facilities subject to the "requirements" of state laws,²² but Congress did not clarify who was to oversee federal facility compliance.²³ This issue

¹⁹Mayo v. United States, 319 U.S. 441, 445 (1943).

²⁰Before 1970 the Clean Air Act stated "that Federal ... installation[s] shall, to the extent practicable and consistent with the interests of the United States, and within any available appropriations, cooperate with" Federal and State air pollution-control authorities. (Air Quality Act of 1967, Pub. L. No. 90-148 §111, 81 Stat. 485, 499 (1967)).

²¹Hancock v. Train, 426 U.S. 167, 171 (1976) citing legislative history of the Clean Air Act amendments of 1970.

²²In 1970 Congress amended the Clean Air Act to require federal facilities to comply "with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." (Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1689 (1970)).

²³Parallel to the Congressional direction that federal facilities were to comply with state law the President also issued several executive orders to fill the gap. He made it clear that federal facilities were to be an example in pollution prevention and were to follow state rules, however he went on to say that federal facilities were not subject to state procedural requirements. See, Executive Order 11507, 35 Fed. Reg. 2573 (1970),
(continued...)

came before the Supreme Court in the cases of *Hancock v. Train*²⁴ and *The Environmental Protection Agency v. California State Water Resources Control Board*.²⁵ The issue in these cases was whether federal facilities had to comply with state procedural requirements under the Clean Air Act²⁶ and the Clean Water Act.²⁷ The Court in both cases said "no," that state procedural requirements were not "requirements" under the law. Congress had not clearly waived sovereign immunity, thus implying Congress had left it to the federal facilities to oversee their own compliance. However, by implication the Court answered "yes" to the question of whether a federal agency can be subject to state law. The Court clearly stated federal

²³(...continued)

reprinted in 1970 U.S.C.C.A.N. 6218, and Executive Order 11752, 38 Fed. Reg. 34793 (1973), reprinted in 1973 U.S.C.C.A.N. 3537.

²⁴426 U.S. 167 (1976). In this case, under the Clean Air Act, the state of Kentucky had an EPA approved state implementation plan. As part of that plan it required permits. When Kentucky wrote to each of the federal installations in Kentucky requesting that they get operating permits, the federal facilities volunteered the information, and at least one facility even used the permit forms, but federal facilities declined to request permits from the state saying they were not required to get state operating permits. The Supreme Court held for the federal agencies. The Court stated without a clear waiver of federal government power under the supremacy (art. VI, cl. 2) and plenary powers (art. I, § 8, cl. 17) clauses of the Constitution, there was no waiver. Since Congress had not made federal facilities subject to "all" requirements and had not clearly waived federal power, federal facilities were not subject to the procedural requirements of the state programs.

²⁵426 U.S. 200 (1976). In this case the Supreme Court held that Congress had not waived sovereign immunity under the Water Pollution Control Act (Clean Water Act), 33 U.S.C.A. §§ 1251-1387 (1986 & West Supp. 1993), to subject federal facilities to the procedural requirements of state programs.

²⁶42 U.S.C.A. §§ 7401-7671q (1983 & West Supp. 1993).

²⁷33 U.S.C.A. §§ 1251-1387 (1986 & West Supp. 1993).

installations can be subject to a subordinate sovereign, but only when there is "a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'"²⁸ It is a "seminal principle of our law" that the federal constitution and the laws made under it are supreme and they control the constitutions and the laws of the states. The laws and constitutions of the states cannot control the federal government. From that principle comes the corollary principle that the operations of the federal government are exempt from the operation of state laws. This derives from the supremacy clause and is exemplified in the plenary powers clause. The Court in *Hancock* recognized that not all state regulation that touched activities of the Federal government was barred.²⁹ But in this case the court made much of the fact that the states could prohibit the federal government from operating through the use of the power to permit.³⁰ It was clear after *Hancock*, Congress could allow the states to regulate the federal installations by requiring them to get permits even if that meant that they could prohibit operations of the federal facilities.³¹

Further support for this position is found in *California v. United States*,³² another case where the Court found it permissible to subject the federal government to state

²⁸426 U.S. at 179.

²⁹*Id.*

³⁰*Id.* at 180.

³¹*Id.* at 198. The Court state, "Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest." It is unlikely the Court would have given this invitation to the Congress if Congress was unable to subject federal installations to state regulation.

³²438 U.S. 645 (1978).

regulation. In this case the Court had to interpret the meaning of § 8 of the Reclamation Act of 1902.³³ This case involved a Bureau of Reclamation, a part of the U.S. Department of the Interior, irrigation project in California. The Bureau filed with the California State Water Resources Control Board (Board) for unappropriated water in a stream. The Board granted the permit but attached conditions. The question before the Court was whether the Board could place conditions on the permit granted to the Bureau. The position of the United States was it could impound unappropriated water for this project. The Court held, after tracing the history of Western water law and the deference that the United States has given to Western states' water law, that the United States had to apply for a permit and the state could impose conditions on the permit for water as long as they were not inconsistent with congressional directives of the legislation that established the Bureau of Reclamation Project.³⁴ A federal agency can be subject to state law if it is not inconsistent with congressional intent, even to the extent of being able to prohibit the federal agency from operating, the Court's fear in *Hancock*.

³³Section 8 read, "[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." *Id.* at 650-51.

³⁴*Id.* at 679.

The Court in *Hancock* opined that if Congress wanted federal facilities subject to state permitting procedures, "it need only amend the Act to make its intention manifest."³⁵ And that is exactly what Congress did during the 94th Congress. Congress made it clear that it was giving states the authority to oversee federal facility compliance, to include the issuance of permits, by specifically amending the Clean Air Act and the Clean Water Act in light of the drafting instructions in *Hancock v. Train*. It was in this same Congress that RCRA was passed.

PASSAGE OF RCRA

Even as it was amending the Clean Air and Clean Water Acts to reflect that it did want federal facilities to apply for state permits in complying with state laws, the 94th Congress was working on its last major media statute, The Resource Conservation and Recovery Act of 1976.³⁶ The language of § 6001³⁷ of RCRA, the federal facilities provision that includes the waiver of sovereign immunity, reflected congressional thoughts of the time. RCRA, a prospective statute, established a "cradle-to-grave" tracking system for hazardous waste.³⁸ The collection and disposal of solid wastes³⁹ was

³⁵*Hancock v. Train*, 426 U.S. 167, 198 (1976) and, similarly, *EPA v. California State Water Resources Control Board*, 426 U.S. 200, 228 (1976).

³⁶Pub. L. No. 94-580, 90 Stat. 2795 (1976), an amendment to The Solid Waste Disposal Act 42 U.S.C. §§ 3251-3259, codified at 42 U.S.C.A. §§ 6901-6992k (1983 & West Supp. 1993).

³⁷42 U.S.C.A. § 6961 (1983 & Westlaw 1993).

³⁸U.S. ENVIRONMENTAL PROTECTION AGENCY, THE NATION'S HAZARDOUS WASTE MANAGEMENT PROGRAM AT A CROSSROADS: THE RCRA IMPLEMENTATION STUDY 10 (1990)[hereinafter RIS].

primarily a function of state, local, and regional agencies.⁴⁰ The federal government would provide a national minimum standard and authorize states to implement their own programs. It was in this context Congress wrestled with both questions: what law to apply to federal facilities and who should oversee enforcement. Even though there is no conference report, one can piece together the thinking of Congress in selecting the version of the federal facility compliance section that was eventually signed into law. Knowledge of what Congress did not pass, in this instance, is instructive of its intent concerning what it did pass. Congress contemplated three different federal facility compliance sections. The first version is found in the Senate bill which eventually became law. In that section state law applied. The two other versions, considered and rejected, were in House versions of the bill. The first House version required federal facilities to comply with federal law and state requirements if the state was a delegated state. The second version considered by the House put EPA in charge of all federal facility compliance.

Returning to the Senate bill, the federal facility compliance section in S.2150,⁴¹ that was enacted into law made federal facilities subject to "all Federal, State, interstate

³⁹(...continued)

³⁹Hazardous wastes are a subset of solid wastes under RCRA (42 U.S.C.A. § 6903(5) (1983 & West Supp. 1993)).

⁴⁰42 U.S.C.A. § 6901(a)(4) (1983 & West Supp. 1993).

⁴¹94th Cong., 2d Sess. (1976).

and local requirements."⁴² The Senate report that accompanied the bill, in discussing this section, stated "it would require every federal agency to provide national leadership in dealing with solid waste and hazardous waste disposal problems. All federal agencies would be required to comply with State and local controls on solid waste and hazardous waste disposal as if they were private citizens."⁴³ The discussion went on to say, "this includes compliance with all substantive and procedural requirements and specifically any

⁴²FEDERAL FACILITIES SEC. 223. Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption. *Reprinted in* 1 SENATE COMM. ENVIRONMENT AND PUBLIC WORKS, 102ST CONG., 1ST SESS., A LEGISLATIVE HISTORY OF SOLID WASTE DISPOSAL ACT, AS AMENDED at 300-02 (Comm. Print 1991) [hereinafter RCRA LEGIS. HIST.].

⁴³S. REP. NO. 988, 94th Cong., 2d Sess. 24 (1976), *reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 342.

requirements to obtain permits."⁴⁴ This is an obvious reference to *Hancock v. Train*,⁴⁵ decided three weeks earlier.

Of even more interest are the House versions of this section which were not passed. H.R. 14496⁴⁶ as first introduced to the House⁴⁷ required federal facilities to comply with federal requirements of hazardous waste law under RCRA and state requirements if the state was a delegated state under RCRA.⁴⁸ When H.R. 14496 was

⁴⁴*Id.*

⁴⁵426 U.S. 167 (1976).

⁴⁶94th Cong., 2d Sess. (1976).

⁴⁷122 CONG. REC. 19764 (1976), *reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 437.

⁴⁸TITLE VII - FEDERAL RESPONSIBILITIES

APPLICATION OF FEDERAL, STATE, AND LOCAL LAW TO FEDERAL FACILITIES

SEC. 701. (a) LOCAL LAW UNDER APPROVED STATE OR REGIONAL PLANS.-

(b) FEDERAL AND LOCAL LAW RESPECTING HAZARDOUS WASTE.-Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any property or facility, or engaged in any activity with respect to hazardous waste shall be subject to, and comply with, all Federal requirements under title III (and all State requirements under a State program authorized under section 306) both substantive and procedural (including injunctive relief and such sanctions as may be imposed by a court to enforce such relief) under this Act, to the same extent, as any nongovernmental entity. Neither the United States nor any officer, agent, or employee thereof shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.

(c) EXEMPTIONS.-The President or his designee may exempt any facility or activity or any department, agency, or instrumentality in the executive branch from compliance with the requirements of title III if he determines it to be in the national security interest of the United States to do so. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's or his designee's making of a new determination. The Administrator shall ascertain the exemptions granted under this subsection and shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year. *Reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 82-83.

finally reported in September,⁴⁹ the federal facilities clause had been changed. Under Sec. 601, the Environmental Protection Agency (EPA) would promulgate regulations for both the non- and hazardous solid waste programs and would be in charge of their administration in relation to federal facilities.⁵⁰ The House Report that accompanied this bill⁵¹ stated that the question of the responsibilities of federal government facilities implementation of federal, state and local environmental law had generated controversy and action from all three branches of the government, including a U.S. Supreme Court decision. The committee members felt that there were still ambiguities as to who should be responsible for taking action against irresponsible federal facilities. The report went

⁴⁹122 CONG. REC. 29578 (1976).

⁵⁰TITLE VI - FEDERAL RESPONSIBILITIES

APPLICATION OF FEDERAL, STATE, AND LOCAL LAW TO FEDERAL FACILITIES

SEC. 601. (a) FEDERAL REGULATIONS TO APPLY TO FEDERAL FACILITIES FOR PURPOSES OF TITLE IV.-

(b) FEDERAL AND LOCAL LAW RESPECTING HAZARDOUS WASTE.-Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any property or facility, or engaged in any activity with respect to hazardous waste shall be subject to, and comply with, all Federal requirements under title III and for purposes of such title (including actions taken by the Administrator under sections 307 and 308) the term "person" includes any department, agency, or instrumentality of the United States.

(c) EXEMPTIONS.-The President or his designee may exempt any facility or activity or any department, agency, or instrumentality in the executive branch from compliance with the requirements of title III if he determines it to be in the national security interest of the United States to do so. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's or his designee's making of a new determination. The Administrator shall ascertain the exemptions granted under this subsection and shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year. 122 CONG. REC. 32613 (1976), *reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 728-29.

⁵¹H. REP. NO. 1491, 94th Cong., 2d Sess. (1976), *reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 562.

on to discuss *Hancock v. Train*⁵² and *Environmental Protection Agency v. California*.⁵³ The Administrative Conference of the United States had reviewed the problem as it affected all environmental laws and submitted a copy of its report to the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce on July 24, 1975. In that report the Administrative Conference recommended that "a single federal agency be delegated exclusive authority to develop and administer procedures to ensure compliance by federal facilities with non-federal environmental quality standards."⁵⁴ The committee focused on two questions: "(1) What standards relating to discarded materials⁵⁵ and hazardous waste should apply to federal facilities, and (2) who should enforce such standards."⁵⁶ In recommending Section 601 of H.R. 14496 the committee felt it had solved problem of regulating "irresponsible" federal facilities by recommending a single federal agency administer and enforce the "discarded and hazardous waste programs against federal agencies." The committee felt that there were clear standards, both substantive and procedural, for federal agencies to follow; there was a clear method of enforcement by EPA or through citizen suits; and finally that

⁵²426 U.S. 167 (1976).

⁵³426 U.S. 200 (1976).

⁵⁴H. REP. NO. 1491, 94th Cong., 2d Sess. 46 (1976), *reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 607.

⁵⁵The House terminology of "discarded materials" was dropped in favor of the Senate's term "solid waste" at the weekend "conference" to reconcile the House and Senate versions of this bill (122 CONG. REC. 32599 (1976), *reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 702).

⁵⁶H. REP. NO. 1491, 94th Cong., 2d Sess. 48 (1976), *reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 609.

"state officials would be relieved of the almost impossible burdens of enforcing federal environmental laws against federal polluters."⁵⁷

H.R. 14496 was scheduled to be considered on 27 September, four days before Congress was to adjourn. There was not enough time to use regular procedures to reconcile the Senate and House versions of RCRA. To overcome the time limitation the two committees of the two houses responsible for the bill met informally on the weekend of 25 and 26 September to work out differences and to work out a mechanism to avoid a conference.⁵⁸ During the weekend conference the Senate version of the federal facilities clause was adopted. The modified bill was passed by both houses⁵⁹ and signed into law by the President.⁶⁰ Congress had rejected the notion of a separate federal standard for federal agencies. State law was to apply as if the federal facility was a "private citizen."

CERCLA

After the enactment of RCRA in 1976 all three media: land, air, and water were covered by major federal laws. The one area that had not been addressed was what to

⁵⁷*Id.* at 49, *reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 610.

⁵⁸William L. Kovacs, *Federal Controls on the Disposal of Hazardous Wastes on Land*, in RESOURCE CONSERVATION AND RECOVERY ACT: A COMPLIANCE ANALYSIS 11, 17 (Thomas F.P. Sullivan ed., Government Institutes, Inc. 1979).

⁵⁹It passed the House without amendment 367 to 4 on September 27, 1976 (122 CONG. REC. 32632 (1976), *reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 764-5). It passed the Senate by voice vote on September 30, 1976 (122 CONG. REC. 33818 (1976), *reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 767).

⁶⁰Statement by the President on Signing S. 2150 Into Law, 12 WEEKLY COMP. PRES. DOC. 1554 (Oct. 22, 1976), *reprinted in* 1 RCRA LEGIS. HIST., *supra* note 42, at 773.

do about hazardous substances already disposed of and presenting problems. The discovery in 1978 of large amounts of hazardous wastes at a residential area at Love Canal in Niagara Falls, New York, brought the improper disposal of hazardous wastes to the attention of the public and ultimately led to the enactment of Comprehensive Environmental Response and Compensation Act of 1980 (CERCLA)⁶¹ on 11 December 1980.

As Congress held hearings and debated CERCLA, also known as Superfund, federal facilities were not mentioned. They were apparently not a concern. They were considered, though, and several provisions in the new law showed where Congress felt federal facilities should fit into the scheme of hazardous substance response and cleanup.

The first section important to federal facilities was § 107(g) which applied CERCLA to federal agencies. It read as follows:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.⁶²

This section continues the philosophy of RCRA that federal facilities should be treated like everyone else. There are other sections important to federal facility compliance.

⁶¹Pub. L. No. 96-510, 94 Stat. 2767 (1980), (codified as amended at 42 U.S.C.A. §§ 9601-9675 (1983 & West Supp. 1993)).

⁶²42 U.S.C.A. § 107(g) (1983 & West Supp. 1993). This has been incorporated into CERCLA § 120(a)(1), 42 U.S.C.A. § 9620(a)(1) (West Supp. 1993), by Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

One of these authorized the President to respond to hazardous substance releases under CERCLA § 104(a)(1).

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan [NCP⁶³], to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource,) or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment, unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.⁶⁴

Another section of importance is CERCLA § 111(e)(3) which stated, "No money in the Fund shall be available for remedial action, ..., with respect to federally owned facilities."⁶⁵ These were the sections that EPA and the President looked to when they defined how the new law would apply to federal facilities.

⁶³"The purpose of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) is to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants." 40 C.F.R. § 300.1 (1992).

⁶⁴42 U.S.C.A. § 9604(a)(1) (1983 & West Supp. 1993). The underlined portion was repealed by SARA and additional language not included above was added.

⁶⁵42 U.S.C.A. § 9611(e)(3) (1983 & West Supp. 1993).

The President in delineating how he would enforce CERCLA issued Executive Order 12316.⁶⁶ The President delegated his response authority under CERCLA § 104(a)(1) to the Secretary of Defense for those "releases from Department of Defense facilities or vessels, including vessels owned or bareboat chartered and operated."⁶⁷ In determining who should oversee cleanup on federal facilities, at least as far as the Department of Defense was concerned, the President decided that DoD would be responsible. For other federal agencies this authority was, for most purposes, delegated to EPA.⁶⁸ In June 1982 EPA decided not to list federal facilities on the National Priorities List⁶⁹ (NPL).⁷⁰ The decision was apparently made because CERCLA § 105

⁶⁶46 Fed. Reg. 42237 (1981). This was actually the second executive order that delegated the President's authority under CERCLA, the first, Exec. Order 12286, 46 Fed. Reg. 9901 (1981), was signed by President Jimmy Carter on the day before President Ronald Reagan took office.

⁶⁷Exec. Order No. 12316 § 2(c), 46 Fed. Reg. 42237, 42238 (1981). Under CERCLA § 115, 42 U.S.C. § 9615 (1983 & West Supp. 1993), "The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this title."

⁶⁸Exec. Order No. 12316 § 2(e), 46 Fed. Reg. 42237, 42238 (1981).

⁶⁹National Priorities List is the list compiled by EPA under CERCLA § 105, 42 U.S.C.A. § 9605 (1983 & West Supp. 1993), "of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response" under CERCLA (40 C.F.R. § 300.5 (1992)).

⁷⁰Memorandum on Guidance for Establishing the National Priorities List from William N. Hedeman, Jr., Director, Office of Emergency and Remedial Response to Superfund Coordinators, Regions I-X (Jun. 28, 1982), *reprinted in Review of Hazardous Waste Disposal Practices at Federal Facilities: Hearings Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Government Relations*, 98th Cong., 1st Sess. 352-53 (1983)[hereinafter *1983 Federal Facilities Hearing*]. This decision was made public in a revision to the National Contingency Plan that was published in the Federal Register (National Oil and Hazardous Substances
(continued...))

provided for the NPL to be used to prioritize releases or threatened releases for remedial action and § 111(e)(3) precluded CERCLA funds from being used for remedial action at federal facilities.⁷¹ Another reason given by EPA was it did not have responsibility for CERCLA cleanup for federal facilities under Executive Order 12316.⁷² On 16 July 1982, EPA promulgated 40 C.F.R. § 300.66(e)(2) which stated, "No facilities presently owned by the Federal Government will be included on the National Priorities List."⁷³

Because Executive Order 12316 did not answer all the questions of the relationship of DoD and EPA for hazardous substance cleanup, these agencies began to negotiate a Memorandum of Agreement in the early part of 1982. It took 18 months for the two agencies to reach an agreement, and even then they had to leave certain areas out.⁷⁴

⁷⁰(...continued)

Contingency Plan: Final Rule, 47 Fed. Reg. 31180, 31192 (1982)). In the preamble EPA stated, "Many commentators questioned how clean-up of Federal facilities would be addressed. EPA is currently developing guidance on this issue. Since the issue requires agreement among Federal agencies as to their respective clean-up obligations, EPA believes that the issue should be resolved in guidance, or through Memoranda of Understanding, rather than through the Plan." *Id.* at 31201-02.

⁷¹Drafts of letter from Lee Thomas, Assistant Administrator, Solid Waste and Emergency Response, to Jerry D. Hair, Executive Vice President, National Wildlife Federation (Fall 1983), *reprinted in 1983 Federal Facilities Hearing, supra* note 70, at 341-46.

⁷²Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 49 Fed. Reg. 37070, 37074 (1984).

⁷³National Oil and Hazardous Substances Contingency Plan: Final Rule, 47 Fed. Reg. 31180, 31215 (1982).

⁷⁴One of the reasons that it took so long to enter into the agreement according to Mr. Lee Thomas was because of the "administrative turmoil within EPA that has taken place
(continued...)

As the Memorandum of Agreement between EPA and DoD was being finished the Subcommittee on Environment, Energy, and Natural Resources of the House Committee on Government Operations held a hearing on 15 August 1983 under the direction of Congressman Mike Synar to review hazardous waste disposal practices at federal facilities.⁷⁵ The hearing began to expose problems with hazardous waste disposal practices at federal facilities, including revelations of improper disposal of PCBs, and a failure of DoD to take responsibility for past practices. The hearing appears to have achieved the purposes of Congressman Synar by moving EPA and DoD to conclude their Memorandum of Agreement and to get them to assess the problems of hazardous waste disposal practices at federal facilities.⁷⁶

It was during the Fall of 1983 that Mr. Lee Thomas, the Assistant Administrator for Solid Waste and Emergency Response at EPA, decided to consider listing federal facilities on the NPL.⁷⁷ When the initial list of 406 NPL sites was published in the Federal Register on 8 September 1983 in response to commentators who felt that federal facilities should be put on the NPL, EPA stated

⁷⁴(...continued)
over the last number of months up until a few months ago." *1983 Federal Facilities Hearing, supra* note 70, (Testimony of Mr. Lee Thomas, Assistant Administrator for Solid Waste and Emergency Response) at 220.

⁷⁵*1983 Federal Facilities Hearing, supra* note 70.

⁷⁶*See generally, 1983 Federal Facilities Hearing, supra* note 70, and, in particular, at 228 for Congressman Synar's purposes for the hearing.

⁷⁷Drafts of letter from Lee Thomas, Assistant Administrator, Solid Waste and Emergency Response, to Jerry D. Hair, Executive Vice President, National Wildlife Federation (Fall 1983), *reprinted in 1983 Federal Facilities Hearing, supra* note 70, at 341-46.

After consideration of this comment, the Agency believes that it may be appropriate to include Federal facility sites on the NPL whe. they meet the criteria for inclusion, and has decided to propose a future amendment to the NCP which would permit it to do so. While it was not feasible to consider Federal facilities for inclusion in this final NPL or in the first update, EPA intends to begin considering Federal facilities for inclusion on the NPL, and expects to include qualifying sites in the next feasible NPL update proposal.

EPA will develop working relationships with Federal agencies on the implementation of corrective actions at Federal sites, whether on a future version of the NPL or not. If the sites are owned by the Department of Defense, they will take the appropriate action, as they have response authority under Executive Order 12316.⁷⁸

EPA continued to comment on the possibility of placing federal facilities on the NPL in 1984, when it promulgated the first update to the NPL,⁷⁹ and again when it proposed 36 federal facilities for inclusion on the NPL.⁸⁰ It was not until February

⁷⁸Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40658, 40662 (1983). In the next update to the NPL which was published on 21 September 1984 EPA still did not list any federal facilities, however it said it intended "to consider Federal facilities in the next update proposal." Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 49 Fed. Reg. 37070, 37074 (1984).

⁷⁹Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 49 Fed. Reg. 37070 (1984).

⁸⁰Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 49 Fed. Reg. 40320 (1984). In the third update EPA "identified" 6 sites that met the criteria for listing on the NPL, opting not to propose any new sites until the NCP was amended (Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 50 Fed. Reg. 14115 (1985)). In the fourth update EPA continued the identification of federal sites and identified 3 new sites (Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 50 Fed. Reg. 37950 (1985)). In the fifth update EPA proposed 2 more sites for inclusion on the NPL (Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 51 Fed. Reg. 21099 (1986)). Finally, in the sixth update EPA proposed 1 more site for inclusion on the NPL (Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 52 Fed. Reg. 2492 (1987)). In these six updates EPA had proposed or identified 48 federal facilities before
(continued...)

1985⁸¹ that EPA actually proposed changing the NCP to allow it to list federal facilities on the NPL. In November of that year that change was made to the NCP.⁸² This decision was made to provide information to the public of the status of Federal government cleanup efforts.⁸³ On 22 July 1987, the first federal facilities were listed on the NPL.⁸⁴ In the almost four years it took EPA to list a federal facility on the NPL after making the decision to do so, two changes occurred in the existing law. These changes complicated that decision and led to a statutory overlap that has caused frustration and litigation. The first change was the enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA),⁸⁵ which amended RCRA, and the second was the

⁸⁰(...continued)

it had named even one to the NPL.

There are currently 123 federal facilities on the NPL and 10 proposed for listing on the NPL (National Priorities List for Uncontrolled Hazardous Waste Sites, 57 Fed. Reg. 47180 (1992) and National Priorities List for Uncontrolled Hazardous Waste Sites, Proposed Rule No. 14, 58 Fed. Reg. 27507 (1993)).

⁸¹National Oil and Hazardous Substances Pollution Contingency Plan: Proposed Rule, 50 Fed. Reg. 5862 (1985).

⁸²National Oil and Hazardous Substances Pollution Contingency Plan: Final Rule, 50 Fed. Reg. 47912 (1985).

⁸³*Id.* at 47931.

⁸⁴National Priorities List for Uncontrolled Hazardous Waste Sites: Final Rule, 52 Fed. Reg. 27620 (1987). Thirty-two federal facilities were added to the NPL, 26 of those had areas subject to RCRA Subtitle C corrective action. At that time 16 sites still were being proposed.

⁸⁵Pub. L. No. 98-616, 98 Stat. 3221 (1984).

enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA),⁸⁶ which amended CERCLA.

THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

It was during the process of deciding to list federal facilities on the NPL that Congress again took up amending RCRA. RCRA, as enacted, was a prospective statute, a "prevention" oriented program. Its primary purpose was to prevent new releases from the management of hazardous waste.⁸⁷ In 1984 while EPA was in the process of deciding whether to list federal facilities on the NPL, Congress amended RCRA with The Hazardous and Solid Waste Amendments (HSWA) of 1984.⁸⁸ Not only did these amendments strengthen the RCRA prevention program, they also added a new mandate: clean up releases at solid waste management units (SWMU).⁸⁹ The two provisions of

⁸⁶Pub. L. No. 99-499, 100 Stat. 1613 (1986).

⁸⁷Corrective Action Management Units and Temporary Unit; Corrective Action Provisions Under Subtitle C, 58 Fed. Reg. 8658, 8660 (1993).

⁸⁸Pub. L. No. 98-616, 98 Stat. 3221 (1984). HSWA has been troublesome since its birth. It came at a time when Congress lacked confidence in EPA's abilities. The Administration did not offer its own bill, which limited EPA's voice in the RCRA reauthorization. Among other things, HSWA created unrealistic deadlines, overlapping laws, and self-implementing regulations. It has hurt the relationship among EPA and the states. *See generally*, RIS, *supra* note 38, at 7.

⁸⁹Corrective Action Management Units and Temporary Unit; Corrective Action Provisions Under Subtitle C, 58 Fed. Reg. 8658, 8660 (1993). Solid Waste Management Unit means "any unit (contiguous area of land on which waste is placed) used for solid waste management (the systematic collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid waste)." In the Matter of: GSX Services of South Carolina, Inc., RCRA Appeal No. 89-22, 1992 WL 420595 (E.P.A.)(Dec. 29, 1992) at *2.

most importance are §§ 206 and 207 of HSWA which were codified at RCRA § 3004(u)-(v).⁹⁰

Section 3004(u) was enacted to ensure that facilities seeking permits under § 3005(c)⁹¹ clean up and control all releases of hazardous wastes or constituents from all SWMUs at the facility whether they were active or not. Congress felt that there was a gap in the law. As written, EPA could find itself issuing a permit⁹² to an owner or operator of a facility for the treatment, storage, or disposal of hazardous waste that was causing ground water contamination from inactive sites without the facility having to address the contamination. Congress realized it might not be feasible to complete the cleanup before issuing a permit, so it included a provision which allowed the owners or operators to agree to a compliance schedule for corrective action, with financial

⁹⁰42 U.S.C. § 6924(u) and (v). Another valuable corrective action tool is RCRA § 3008(h), 42 U.S.C. § 6928(h), for interim status treatment, storage, and disposal facilities. Section 3008(h) was introduced in the Senate as an amendment to HSWA. Under then current EPA regulations there was no requirement for interim status facilities to undertake corrective action. As of December 1983 there were nearly 8,000 interim status facilities and there were only 115 permitted facilities. EPA was at that time estimating that between 50 and 60% of the interim status facilities were leaking or had leaked and required corrective action (130 CONG. REC. 20839-40 (1984), *reprinted in* 2 RCRA LEGIS. HIST., *supra* note 42, at 2219-20). The Congress wanted to give EPA another tool to deal with a viable owner or operator without having to wait for a permit before being able to require corrective action for the entire facility (H.R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. 110-11 (1984), *reprinted in* 2 RCRA LEGIS. HIST., *supra* note 42, at 2420-22). This section gives the Administrator of EPA the discretion to require corrective action "necessary to protect human health or the environment." EPA has opted not to delegate § 3008(h) enforcement authority. States desiring this type of enforcement authority would have to enact parallel statutory authority (Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities, 55 Fed. Reg. 30798, 30855 (1990)).

⁹¹42 U.S.C.A. § 6925(c) (West Supp. 1993).

⁹²Under 42 U.S.C.A. § 6925 (1983 & West Supp. 1993).

assurance, in the permit. To delay issuing the permit would just have delayed the time that a facility would have been subject to the stricter Part 264⁹³ standards.⁹⁴

Section 3004(v) was passed to fill another gap in the law. EPA's prior policy was to limit the scope of corrective action to the property of the polluting facility. EPA had decided that for corrective action it would link the owner's or operator's responsibility with their control; in other words, the owner or operator was not required to take corrective action outside the boundaries of its facility. Congressman Gore offered an amendment to require EPA to change its regulations to require corrective action beyond the boundaries of an owner or operator's facility, when appropriate.⁹⁵ The burden would be on the owner or operator to show that it could not obtain the necessary permission to undertake the action.⁹⁶

The conference report on HSWA was agreed to by the House on 3 October

⁹³Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 40 C.F.R. Part 264.

⁹⁴H.R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. 92 (1984), *reprinted in* 2 RCRA LEGIS. HIST., *supra* note 42, at 2402.

⁹⁵129 CONG. REC. 30840-41 (1983) (statement of Rep. Gore), *reprinted in* 2 RCRA LEGIS. HIST., *supra* note 42, at 1858-59, and H.R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. 92 (1984), *reprinted in* 2 RCRA LEGIS. HIST., *supra* note 42, at 2402.

⁹⁶Section 3004(v), 42 U.S.C. § 6924(v). This section was not self implementing. The final rule was promulgated in Hazardous Waste; Codification Rule for the 1984 RCRA Amendments, 52 Fed. Reg. 45788 (1987) (codified at 40 C.F.R. §§ 264.100(e) and 264.101(c)).

1984⁹⁷ and on 5 October by the Senate.⁹⁸ The President signed the Act into law on 8 November 1984.⁹⁹

SARA

As Congress was working on HSWA it was already holding hearings on the reauthorization of CERCLA. There were problems with CERCLA that Congress felt needed to be addressed. One of the areas was federal facility cleanups. Besides the concerns that federal facilities were not getting cleaned up, there was concern about federal agencies, particularly DoD, overseeing their own cleanup. In The Superfund Amendments and Reauthorization Act of 1986 (SARA),¹⁰⁰ Congress revisited the issues concerning federal facilities that it wrestled with when it was considering RCRA -- what rules to apply and who was to enforce those rules. In late 1984 EPA had the responsibility to promulgate the rules under the NCP for CERCLA cleanups; however, it was the federal agency that had the responsibility to see those rules were enforced, with technical assistance from EPA.¹⁰¹

⁹⁷130 CONG. REC. 29533 (1984), *reprinted in* 2 RCRA LEGIS. HIST., *supra* note 42, at 2448.

⁹⁸*Id.* at 30703, *reprinted in* 2 RCRA LEGIS. HIST., *supra* note 42, at 2472. A technical amendment was needed after passage and was offered as House Continuing Resolution 376. It was passed in the House and the Senate on 11 October 1984. *Id.* at 32131 & 32240, *reprinted in* 2 RCRA LEGIS. HIST., *supra* note 42, at 2476 & 2477.

⁹⁹*Id.* at 32348, *reprinted in* 2 RCRA LEGIS. HIST., *supra* note 42, at 2479.

¹⁰⁰Pub. L. No. 99-499, 100 Stat. 1613 (1986).

¹⁰¹Exec. Order 12316, 46 Fed. Reg. 42237 (1981).

SENATE VERSION

The Senate was the first to pass its version of what would eventually be enacted into law as SARA. Its version of the federal facilities clause, as it was first introduced on 3 January 1985, was short and only required that the Administrator of EPA and the state, (where a cooperative agreement existed) concur in the remedial action selected.¹⁰² This was an obvious reaction to Executive Order 12316. Another section had been added by the time the bill was reported out of the Senate Committee on Environment and Public Works on 18 March 1985. This new section required the Administrator to compile a "Federal Agency Hazardous Waste Compliance Docket," to assess facilities for listing on the NPL, and to complete cleanup as expeditiously as practicable. In the discussion of the provision the Committee said its purpose was to identify sites and have the responsible federal agency submit budget requests for funding the cleanup. In other words, the Committee was trying to get the federal agencies to see what facilities needed

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FEDERAL FACILITIES

SEC. 122. Section 115 of the Comprehensive Environmental, Compensation, and Liability Act of 1980 is amended by inserting before the period at the end thereof a colon and the following: "*Provided*, That with respect to a Federal facility or activity for which such duties or powers are delegated to an officer, employee or representative of the department, agency or instrumentality which owns or operates such facility or conducts such activity, the concurrence of the Administrator (and the responsible State official where a cooperative agreement has been entered into) shall be required for the selection of appropriate remedial action and the administrative order authorities of section 106(a) are hereby delegated to the Administrator".

S. 51, 99th Cong., 1st Sess. (as introduced Jan. 3, 1985), *reprinted in* 2 SENATE COMM. ENVIRONMENT AND PUBLIC WORKS, 101ST CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986 (PUBLIC LAW 99-499) at 451-52 (Comm. Print 1990) [hereinafter SARA LEGIS. HIST.].

to be cleaned up and then request the funds to do so. Congress was looking for information. Another reaction to Executive Order 12316 was a section added to keep the President from delegating responsibility to anyone other than employees of EPA.¹⁰³

The Senate debated their version of SARA in September 1985 and passed their bill as an amendment to H.R. 2005 on 26 September 1985 by a vote of 86 to 13.¹⁰⁴ Several amendments concerning federal facility compliance were offered and agreed to during the debates. The most important for understanding the relationship between the federal government and the states was Amendment No. 682 offered by Senator Wilson from California.¹⁰⁵ When presenting the amendment on 24 September 1985, Senator

¹⁰³SUPERFUND IMPROVEMENT ACT OF 1985, S. REP. NO. 11, 99th Cong., 1st Sess. 60-61 (1985), *reprinted in* 2 SARA LEGIS. HIST., *supra* note 102, at 652-53.

¹⁰⁴131 CONG. REC. 25090-91 (1985).

¹⁰⁵131 CONG. REC. 24733 (1985), *reprinted in* 2 SARA LEGIS. HIST., *supra* note 102, at 1250. The amendment read as follows

[(c) RIFS AND INTERAGENCY AGREEMENT.-]

(1) RIFS - Not later than six months after the inclusion of any facility on the National Priorities List (NPL), or within six months of the enactment of the Superfund Improvement Act of 1985, whichever is later, the department, agency, or instrumentality which owns or operates such facility shall enter into an agreement with the Administrator and appropriate State authorities under which such department, agency, or instrumentality will carry out a remedial investigation and feasibility study for such facility. The agreement shall provide for a timetable and deadlines for commencement and expeditious completion of such investigation and study.

(d) STATE AND LOCAL PARTICIPATION -

(1) the Administrator shall consult with the relevant officials of the State and locality in which the facility is located and shall consider their view in selecting the remedial action to be carried out at the facility.

(2) Each department, agency, or instrumentality responsible for compliance with this section shall afford to relevant State and local

(continued...)

Wilson said that it wasn't until three years ago that DoD began to seriously address the problem of hazardous waste cleanup. He felt that DoD had not made enough progress and the pace of cleanup was not fast enough. He saw greater cooperation between the appropriate state authorities and the federal government as one way to speed up this process. He cited examples from California where the state and EPA were refused information on the DoD equivalent to the remedial investigation and feasibility study phase until the report was in "final draft form." Once after a report was released it took over two years to make the necessary changes to accommodate the views of the state and EPA.¹⁰⁶

Senator Wilson stated his amendments required

Federal facilities to afford the EPA and the affected States the opportunity to participate in the development of all scope of work proposals for toxic waste cleanups ...¹⁰⁷

He felt that

the role of the States and EPA should not be limited to just the review of final cleanup proposals, they should have an opportunity to make meaningful contributions in the development stages.¹⁰⁸

¹⁰⁵(...continued)

officials the opportunity to participate in the planning and formulation of the remedial action, including but not limited to the review of all applicable data as it becomes available and the development of studies, reports, and action plans.

Id. at 24781, reprinted in 2 SARA LEGIS. HIST., *supra* note 102, at 1251.

¹⁰⁶*Id.* at 24734, reprinted in 2 SARA LEGIS. HIST., *supra* note 102, at 1251-52.

¹⁰⁷*Id.*, reprinted in 2 SARA LEGIS. HIST., *supra* note 102, at 1252.

¹⁰⁸*Id.*

HOUSE VERSION

The first House version of what would become SARA was introduced as H.R. 2817 by Congressman Eckart and others on 20 June 1985.¹⁰⁹ Section 119 of this bill, which added § 120 to CERCLA, was similar to § 120 of CERCLA as it was eventually enacted; however, there were several interesting changes as the bill made it through the legislative process and became law.

The bill at this point added § 120(a) as follows:

Sec. 120. FEDERAL FACILITIES

(a) APPLICATION OF ~~ACT~~ TO FEDERAL GOVERNMENT. -

(1) IN GENERAL. - Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this ~~Act~~ in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this ~~Act~~.

(2) APPLICATION OF ~~GUIDELINES, ETC., REQUIREMENTS~~ TO FEDERAL FACILITIES. - All guidelines, rules, regulations, ~~procedures~~, and criteria which are applicable to preliminary assessments carried out under this ~~Act~~ for facilities at which hazardous substances are located, applicable to evaluations of such facilities under the National Contingency Plan, applicable to inclusion on the National Priorities List, or applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the ~~same~~ extent as such guidelines, rules, regulations, and criteria are applicable to other facilities. No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, ~~procedures~~, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this ~~Act~~.

(3) EXCEPTIONS. - This subsection shall not apply to the extent otherwise provided in this section with respect to applicable time periods.

¹⁰⁹99th Cong., 1st Sess. (1985), *reprinted in 3 SARA LEGIS. HIST.*, *supra* note 102, at 1609-1616.

This subsection shall also not apply to any requirements relating to ~~bonding, insurance, or~~ financial responsibility.¹¹⁰

At this point the waiver of sovereign immunity, current § 120(a)(4), was not part of the bill. Current § 120(g) was already in the bill as § 120(f)

(f) TRANSFER OF AUTHORITIES. - Except for authorities which are delegated by the Administrator to an officer or employee of the Environmental Protection Agency, no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise, to any other officer or employee of the United States or to any other person.¹¹¹

This, of course, like its Senate counterpart, was added to keep the President from delegating to the regulated federal agency the ability to oversee cleanup of federal facilities on the NPL.

Also at this point, the bill included the paragraph, current § 120(i), that said corrective action requirements were not meant to be affected by § 120:

(h) OBLIGATIONS UNDER SOLID WASTE DISPOSAL ACT. - Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act (including corrective action requirements).¹¹²

When it was introduced, H.R. 2817 was referred to three different committees: Energy and Commerce, Ways and Means, and Public Works and Transportation. When

¹¹⁰Except for some word changes, such as Act to chapter, and using a United States Code Section number instead of the Act's section number this section was enacted almost as introduced. The words struck through were later deleted before the bill was enacted. The wording of § 120(a)(2) was strengthened from "guidelines" to "requirements." The only other changes were another sentence added at the end of § 120(a)(1) and § 120(a)(3).

¹¹¹3 SARA LEGIS. HIST., *supra* note 102, at 1614.

¹¹²*Id.* at 1616.

the Energy and Commerce Committee reported their version of H.R. 2817 on 1 August 1985, it was then referred to two more committees sequentially: Judiciary, and Merchant Marine and Fisheries.¹¹³ Each of these five committees filed a report with their version of H.R. 2817.¹¹⁴

The bill, as reported by the Energy and Commerce Committee in August, greatly increased the role of the states in the cleanup of federal facilities. Current § 120(a)(4) was included in the bill at this point without the anti-discrimination clause.¹¹⁵ The basic process of entering into an Interagency Agreement found in present § 120(e) was in the original bill; however, as it was written in August state concurrence was required for selection of remedial action in the bill,¹¹⁶ not just consultation as the law is written today. Also federal facilities were required to get all federal, state, and local permits,

¹¹³131 CONG. REC. 34633 (statement of Congressman Dingell)(1985), *reprinted in* 5 SARA LEGIS. HIST., *supra* note 102, at 4034.

¹¹⁴SUPERFUND AMENDMENTS OF 1985, H. REP. NO. 253, 99th Cong., 1st Sess. (1985). This report was in five parts. Part 1 was submitted by Energy and Commerce on 1 August 1985. Part 2 was submitted by Ways and Means on 28 October 1985. Part 3 was submitted by Judiciary on 31 October 1985. Part 4 was submitted by Merchant Marine and Fisheries on 31 October 1985. Part 5 was submitted by Public Works and Transportation on 12 November 1985. *Reprinted in* 3 & 4 SARA LEGIS. HIST., *supra* note 102.

¹¹⁵ (4) STATE LAWS. - State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List.

SUPERFUND AMENDMENTS OF 1985, H. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 25 (1985), *reprinted in* 3 SARA LEGIS. HIST., *supra* note 102, at 1788.

¹¹⁶Addition after § 120(e)(3)(C) "The concurrence of the State in which the facility is located shall be required for the selection of the remedial action to be carried out at that facility." *Id.* at 26, *reprinted in* 3 SARA LEGIS. HIST., *supra* note 102, at 1789.

unlike others subject to CERCLA who were not required to obtain permits.¹¹⁷

Section 120 of H.R. 2817 as reported by the House Committee on Public Works and Transportation was almost identical to the version of § 120 reported by the Energy and Commerce Committee.¹¹⁸ The Report accompanying the Public Works and Transportation version of the bill stated "No department, agency or instrumentality of the United States may adopt or utilize any guidelines, rules, regulations, procedures or criteria which are inconsistent with those established by the Administrator of EPA under CERCLA."¹¹⁹ It went on to say that "State laws concerning removal and remedial actions, including state laws regarding enforcement, apply to removal and remedial actions at facilities owned or operated by a department, agency or instrumentality of the United States when those facilities are not included on the National Priorities List."¹²⁰ For sites on the NPL, "The concurrence of the state in which the facility is located shall be required for the selection of the remedial action to be carried out at that facility."¹²¹

¹¹⁷H.R. 2817, sec. 120, § 121(g)(4), 99th Cong., 1st Sess. (1985), *reported in* H. REP. NO. 253, 99th Cong., 1st Sess., pt.1, at 29 (1985), *reprinted in* 3 SARA LEGIS. HIST., *supra* note 102, at 1792.

¹¹⁸There were several minor word changes that did not affect the substantive meaning of the section and an additional requirement for deeds transferring the United States' interest in property in § 120(g)(3)(D). *See*, H. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 24-27 (1985), *reprinted in* 3 SARA LEGIS. HIST., *supra* note 102, at 1787-90, and H. REP. NO. 253, 99th Cong., 1st Sess., pt. 5, at 206-09 (1985), *reprinted in* 4 SARA LEGIS. HIST., *supra* note 102, at 2714-17.

¹¹⁹SUPERFUND AMENDMENTS OF 1985, H. REP. NO. 253, 99th Cong., 1st Sess., pt. 5., at 47 (1985), *reprinted in* 4 SARA LEGIS. HIST., *supra* note 102, at 2555.

¹²⁰*Id.*

¹²¹*Id.* at 49, *reprinted in* 4 SARA LEGIS. HIST., *supra* note 102, at 2557.

Finally, the report stated, "New subsection (h) provides that nothing in this section shall effect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirements of the Solid Waste Disposal Act."¹²²

While § 120, the federal facilities clause, was substantially similar in the two committees' versions, that was not the case for the rest of SARA's provisions. It did not even mean there was a consensus for that version of the federal facilities section in the House.¹²³ A compromise bill, H.R. 3852,¹²⁴ was introduced in the House on 4 December 1985. In the meantime, yet another House committee became involved in the reauthorization process - the House Armed Services Committee. An Environmental Restoration Panel was formed because the question came under the jurisdiction of four subcommittees of that committee and a hearing was held over which Congressman

¹²²*Id.* at 50, reprinted in 4 SARA LEGIS. HIST., *supra* note 102, at 2558.

¹²³*Defense Environmental Restoration Program to Clean Up Former Hazardous Waste Dump Sites: Hearings Before the Environmental Restoration Panel of the House Comm. on Armed Services*, 99th Cong., 1st Sess. 34 (1985)(statement of Congressman Moody)[hereinafter *McCurdy Hearing*].

¹²⁴99th Cong., 1st Sess. (1985), reprinted in 5 SARA LEGIS. HIST., *supra* note 102, at 3567-4017. It took seven months to reach this compromise (131 CONG. REC. 34634 (1985)(statement of Congressman Fields), reprinted in 5 SARA LEGIS. HIST., *supra* note 102, at 4036). The funding of CERCLA had expired on 30 September 1985 (131 CONG. REC. 34633 (1985)(statement of Congressman Dingell), reprinted in 5 SARA LEGIS. HIST., *supra* note 102, at 4035) and the pressure was on the House to pass their version of the bill. In fairly complex legislative maneuvering H.R. 3852 was offered as a compromise bill. The text of H.R. 3852 was substituted for the text of H.R. 2817. The ability to amend H.R. 2817 was limited and after debate and passage the text of the amended bill was substituted for the text of H.R. 2005. See generally, 5 SARA LEGIS. HIST., *supra* note 102, and 1 SARA LEGIS. HIST., *supra* note 102, at vi.

McCurdy presided.¹²⁵ Its efforts are apparent in several changes that were included in the compromise bill. Section 120(a)(4) was modified to its present form with anti-discrimination language.¹²⁶ A national security clause¹²⁷ was also added. By this time the requirement for concurrence of the state in the remedial plan was moved to § 121(j)(7) and more specificity as to what that meant was included. Section 121 gave states substantial and meaningful participation in the process but not absolute veto power.¹²⁸ Section 121(i) also did away with the requirement for federal facilities to get permits, except those required under RCRA § 3004(u) (unless the "unit was within the scope of the response action at a site on the National Priorities List under this Act," then

¹²⁵*McCurdy Hearing, supra* note 124, at 1-2.

¹²⁶The sentence added was:

The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

H.R. 2005, §120(a)(4), cl. 2, 99th Cong., 1st Sess. (1985), *reprinted in* 5 SARA LEGIS. HIST., *supra* note 102, at 4478.

¹²⁷H.R. 2005, §120(j), 99th Cong., 1st Sess. (1985), *reprinted in* 5 SARA LEGIS. HIST., *supra* note 102, at 4487-89. Except for the last sentence which was added in the conference report this section was as enacted into law. The conference report stated that the national security waiver was included because of DoD and DoE concerns that operations at their facilities could be interfered with to the detriment of national security in times of war or national emergency (SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, H. CONF. REP. NO. 962, 99th Cong., 2d Sess. 243 (1986), *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 5059).

¹²⁸H.R. 2005, §121(j), 99th Cong., 1st Sess. (1985), *reprinted in* 5 SARA LEGIS. HIST., *supra* note 102, at 4501-17.

it did not need to get a permit under § 3004(u)).¹²⁹ It was in this form that the bill passed the House on 10 December 1985, by a vote of 391 to 33.¹³⁰ The Senate and the House versions of the bills differed so they were sent to committee to resolve the differences. Almost 11 months passed before the differences were resolved and the compromise bill was submitted to each house of Congress.

The conference report¹³¹ was introduced on 3 October 1986. The report explains that federal facilities must comply with "all guidelines, rules, regulations and criteria promulgated pursuant to CERCLA." This includes complying with "all procedural and substantive provisions of the National Contingency Plan."¹³² The new law required the establishment of a Federal Agency Hazardous Waste Compliance Docket that was to be updated every six months. The conference report adopted the language of the Senate amendment that required "all qualifying" federal facilities be placed on the

¹²⁹H.R. 2005, §121(j)(8), 99th Cong., 1st Sess. (1985), *reprinted in* 5 SARA LEGIS. HIST., *supra* note 102, at 4514. The entire section read

(8) CORRECTIVE ACTION AT FEDERAL FACILITIES.- The waiver under this subsection of any requirement for a permit shall not be construed to exempt any solid waste management unit within the boundaries of a facility owned or operated by a department, agency, or instrumentality of the United States from the corrective action required by section 3004(u) of the Solid Waste Disposal Act for releases of hazardous waste or constituents, unless such unit was within the scope of the response action at a site on the National Priorities List under this Act.

¹³⁰131 CONG. REC. 35658 (1985), *reprinted in* 5 SARA LEGIS. HIST., *supra* note 102, at 4354-55.

¹³¹SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, H. CONF. REP. NO. 962, 99th Cong., 2d Sess. (1986), *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 4818.

¹³²*Id.* at 240-41, *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 5056-57.

NPL.¹³³ The House had allowed the Administrator of EPA the discretion to evaluate a federal facility for placement on the NPL.¹³⁴ Both House and Senate amendments had required that the interagency agreement review the "alternative remedial actions and selection of the remedial action plan by the Administrator." The conference substitute modified this by providing a joint selection of the remedial action by the head of the Federal agency and the Administrator with the Administrator having the ultimate authority to decide if there was a disagreement. The Administrator was also given the additional duty to make an independent determination that the remedial action was consistent with the NCP and that the remedial action chosen was the most appropriate for the facility.¹³⁵ The conference substitute adopted the Senate's version of state and local participation, that had been modified to clarify that federal agencies were subject to § 121 cleanup standards.¹³⁶ The language on permits was also strengthened to adopt EPA's position that permits were not required. This included dropping the House language that would have required a federal facility to get a permit under RCRA §

¹³³*Id.* at 241, *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 5057. Under the Senate version the Federal Agency Hazardous Waste Compliance Docket only contained information submitted under § 3016 of RCRA, this was expanded in conference to include information submitted under §§ 3005 and 3010 of RCRA and § 103 of CERCLA. What the law actually says is that "the Administrator shall take steps to assure that a preliminary assessment is conducted for each facility on the docket ... [and] *where appropriate* - ... include such facilities on the National Priorities List." (emphasis added, 42 U.S.C.A. § 9620(d)(West Supp. 1993)).

¹³⁴*See*, H.R. 2005, § 120(d), 99th Cong., 1st Sess. (1985), *reprinted in* 5 SARA LEGIS. HIST., *supra* note 102, at 4480-81.

¹³⁵*Id.* at 241-42, *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 5057-58.

¹³⁶*Id.* at 242, *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 5058.

3004(u) corrective action if the site was not on the NPL.¹³⁷ The language that was adopted stated, "(e) PERMITS AND ENFORCEMENT.- (1) No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section."¹³⁸ While not articulated in the Conference Report, there was an important change to the language of the Senate version that weakened the role of the states. In what was enacted as § 120(e)(1) the agency which owned or operated a federal facility within six months of being placed on the NPL was required to start a remedial investigation and feasibility study for that facility "in consultation with the Administrator and appropriate State authorities." Under the Wilson amendment the agency had been required to "enter into an agreement with the Administrator and appropriate State authorities under which" the agency would "carry out a remedial investigation and feasibility study for such facility."

Concerning RCRA corrective action the report stated

The House provision relating to ... obligations of Federal facilities under the Solid Waste Disposal Act is adopted by the conference substitute. In affirming the applicability of the corrective action requirements of the Solid Waste Disposal Act to Federal facilities, the conferees explicitly refer to the requirements of Section 3004(u) as set forth in the Environmental Protection Agency's recodification rule published on July 15, 1985,^[139] and the interpretation signed by the

¹³⁷H.R. 2005, §121(j)(8), 99th Cong., 1st Sess. (1985), *reprinted in* 5 SARA LEGIS. HIST., *supra* note 102, at 4514.

¹³⁸42 U.S.C.A. § 121(e)(1) (West Supp. 1993).

¹³⁹Hazardous Waste Management System; Final Codification Rule, 50 Fed. Reg. 28702 (1985). This rule contained the broad definition of facility, but it did not apply to federal facilities.

Administrator on February 11, 1986, and published in the Federal Register on March 5, 1986.¹⁴⁰ Federal facilities are subject to corrective requirements to the same extent as any facility owned or operated by private parties and operate under the same property-wide definition of facility.¹⁴¹

Finally, another provision was stuck in the settlements portion of SARA during the settlement conference - § 122(e)(6):

(6) INCONSISTENT RESPONSE ACTION.-

When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.¹⁴²

According to the conference report this section was included, "to clarify that no potentially responsible party may undertake any remedial action at a facility unless such remedial action has been authorized by the President."¹⁴³ Senator Mitchell in remarks on the floor stated, "This is to avoid situations in which the PRP begins work at a site that prejudices or may be inconsistent with what the final remedy should be or

¹⁴⁰Hazardous Waste Management System; Supplement to Preamble to Final Codification Rule, 51 Fed. Reg. 7722 (1986). This rule extended the property wide definition of facility to federal facilities.

¹⁴¹SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, H. CONF. REP. NO. 962, 99th Cong., 2d Sess. 242 (1986), *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 5058.

¹⁴²42 U.S.C.A. § 9622(e)(6) (West Supp. 1993).

¹⁴³SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, H. CONF. REP. NO. 962, 99th Cong., 2d Sess. 254 (1986), *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 5070.

exacerbates the problem."¹⁴⁴ This section would later become the linchpin of EPA's argument of how to resolve the overlap between RCRA corrective action and CERCLA,¹⁴⁵ discussed later in this paper.

In tracing the states' involvement in federal facility compliance as the bill wound its way toward passage, it went from no involvement, to veto power, to a consultive role. The Senate passed the conference report on 3 October 1986 by a vote of 88 to 8.¹⁴⁶ The House took up the conference report five days later and passed it 386 to 27.¹⁴⁷ The President signed the Act into law on 17 October 1986.¹⁴⁸

CASE LAW

REQUIREMENTS AND ENFORCEMENT

In the litigation from RCRA and CERCLA courts have looked at both issues: what law applies and who enforces it against federal facilities. In analyzing whether a hazardous waste/constituent/substance cleanup law of a state applies to a federal facility several questions must be addressed. The first question is whether the state has been

¹⁴⁴131 CONG. REC. 28340 (1986), *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 5206.

¹⁴⁵The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities, 54 Fed. Reg. 10520, 10523 (1989).

¹⁴⁶131 CONG. REC. 28456 (1986), *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 5243.

¹⁴⁷131 CONG. REC. 29790 (1986), *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 5386-87.

¹⁴⁸Superfund Amendments and Reauthorization Act of 1986: Statement on Signing H.R. 2005 Into Law. October 17, 1986, 22 WEEKLY COMP. PRES. DOC. 1412 (Oct. 27, 1986), *reprinted in* 1 SARA LEGIS. HIST., *supra* note 102, at 171.

delegated corrective action authority under RCRA.¹⁴⁹ If the answer is "yes," it is clear that state corollaries to § 3004(u) or (v) in a delegated state are "requirements," that is, they are applicable law that the federal facility must follow. There was also no doubt, after RCRA, that the delegated state is the entity that has primary oversight authority. The real issue in a delegated state is what enforcement tools are available to the state to make their program work.

REQUIREMENTS

If the state is not delegated authority under RCRA, then the states ability to regulate federal facilities depends on whether the United States has waived sovereign immunity under RCRA § 6001 or CERCLA § 120(a)(4). Put another way, is the state requirement a "requirement" "respecting control and abatement of solid waste or hazardous waste disposal and management"¹⁵⁰ the test under RCRA or does the state requirement concern "removal and remedial action"¹⁵¹ the test under CERCLA. The waiver of sovereign immunity under RCRA allows states to regulate federal facilities even if the state is not a delegated state. The section clearly says, "all" laws and, as shown earlier, Congress could have written a sovereign immunity waiver restricted to

¹⁴⁹A delegated state is a state authorized to administer and enforce a Resource Conservation and Recovery Act (RCRA) hazardous waste program, in lieu of the federal program. This authorization is granted by EPA after notice and opportunity for public hearing if the state program is equivalent and consistent with the federal program, and provides for adequate enforcement of the requirements under RCRA, *see* 42 U.S.C. § 6926. There are currently 16 states with corrective action authorization and one with interim authorization, though for some states this only means delegation of authority under § 3004(u).

¹⁵⁰42 U.S.C.A. § 6961 (1983 & West Supp. 1993).

¹⁵¹42 U.S.C.A. § 9620(a)(4)(West Supp. 1993).

delegated states, but it rejected that approach in 1976. Two lines of authority have developed from the court decisions analyzing the word "requirement": those cases that construed "requirement" narrowly and those that have construed it liberally. One of the first courts to look at the word "requirements" was *Florida v. Silvex*.¹⁵² This is a pre-SARA case. In this case, Pepper Industries, Inc., was responsible for removing waste materials from a Navy installation. Pepper took these materials to Silvex's facilities for storage and incineration. In December 1981 contents of a tank owned by Pepper at the Silvex facility spilled on the ground. Florida took action under its statute that allowed it "to take emergency action when the spillage of hazardous waste materials poses an imminent hazard to the public health, safety and welfare." Under another statute, Florida claimed the Navy was strictly liable for removal costs because they had owned or possessed the released hazardous waste.

In its analysis the court set forth a four part test: 1) the federal government had to have consented to be sued, 2) consent could not be implied, but must have been unequivocally expressed, 3) the government's consent must be strictly construed and may not be modified by implication and 4) states, like any other legal entity, are barred from suing the federal government unless there is an express waiver of sovereign immunity. After examining the legislative history and the case law, the court defined requirements "as objective and ascertainable state regulations." The court found that the State did not show any requirements that the Navy failed to meet. The statutes applied liability, but were not themselves requirements.

¹⁵²606 F. Supp. 159 (M.D. Fla. 1985).

In analyzing this case, while not stated, the court determined the Navy had clean hands. It did not do anything wrong, the contamination was on nonfederal property, and CERCLA § 120(a)(4) had not yet been enacted. Since 1985 some courts have construed the term "requirement" narrowly within the context of enforcement tools¹⁵³ while a more recent line of cases concerning cleanup have construed the term "requirement" more liberally.

*Parola v. Weinberger*¹⁵⁴ is one of the first cases that gave a broad interpretation to the term "requirements." This case was not a hazardous waste cleanup case. It was a solid waste case that involved a local municipal ordinance requiring the Navy to honor the exclusive garbage collection franchise granted by the city to Parola. The General Accounting Office had issued an opinion that RCRA § 6001 was a statute that required the Navy to procure from a specified source, ie., Parola. The district court had agreed with the reasoning of the opinion and had found for Parola. The circuit court said since this was a question of statutory interpretation not concerning procurement statutes GAO was owed no deference. The court framed the issue as whether the city's ordinance was a "local requirement ... respecting control and abatement of solid waste" under RCRA § 6001.

In analyzing the issue, the court found that "solid waste" under RCRA included garbage and that the Navy's arrangements for garbage collection comes within the meaning of "disposal or management of solid waste" under § 6001. The next step was

¹⁵³See *infra* text accompanying notes 173-186.

¹⁵⁴848 F.2d 956 (9th Cir. 1988).

to determine if the ordinance was a requirement. Not finding the term defined, the court looked at the legislative history of RCRA and at the Clean Air Act and Clean Water Act.

In the legislative history of RCRA the court found a "pervasive congressional concern that state and local authorities attempt to establish comprehensive systems for solid waste disposal and collection." The court felt that "local regulations requiring use of an exclusive garbage collection franchise are RCRA 'requirements' where such regulations are part of the state waste management plan." The court found that this ordinance fit into the state solid waste management plan, and therefore was a requirement under RCRA.

In an earlier case *People of the State of California v. Walters*,¹⁵⁵ the court held that criminal sanctions were an enforcement tool, not requirements. The court distinguished its holding in *Walters* by saying that criminal sanctions are a tool to enforce standards and are not permit requirements. The court felt that "an exclusive garbage collection system is more like a permit requirement than a criminal sanction."

The next court to look at the issue of "requirements" was the Pennsylvania Commonwealth Court in *Commonwealth, Department of Environmental Resources v. United States Small Business Administration*.¹⁵⁶ The Small Business Administration (SBA) acquired the Mountville Wallpaper Company Facility in Pennsylvania in 1987. During an inspection in 1987 by the Pennsylvania Department of Environmental Resources (DER) between 75 and 100 barrels "containing contaminants" were found

¹⁵⁵751 F.2d 977 (1985). See *infra* text accompanying notes 173-174.

¹⁵⁶134 Pa. Commw. 468, 579 A.2d 1001 (1990) (en banc).

stored at several places on the facility. In 1988 DER found samples from the barrels and from soil around leaking barrels to contain hazardous substances. DER went to court requesting, among other things, that SBA comply with state environmental laws. SBA raised the affirmative defense of sovereign immunity.¹⁵⁷

The court looked at the waivers of sovereign immunity under RCRA, the Clean Water Act, and CERCLA and found in each case that Congress had indeed waived sovereign immunity. In looking at the waiver under RCRA¹⁵⁸ the SBA argued that Congress, by using the term "requirement," "intended to limit the scope of the immunity waiver to objectively ascertainable, administratively-predetermined substantive requirements that state environmental authorities and courts can apply uniformly."¹⁵⁹ The SBA cited *Hancock*¹⁶⁰ and *California State Water Resources Control*¹⁶¹ in support of its contention. The court noted that the U.S. Supreme Court had placed great reliance on the fact that the word "all" was not used before "requirements," and the Clean Air Act and the Clean Water Act, the statutes involved, had been amended shortly after those decisions were announced. The court found that the activities engaged in by the SBA were included in the definition of "disposal" under the Pennsylvania Solid Waste Management Act (SWMA). The other decisions that the SBA relied on were not cited

¹⁵⁷*Id.* at 470.

¹⁵⁸42 U.S.C. § 6961.

¹⁵⁹134 Pa. Commw. at 472.

¹⁶⁰*Hancock v. Train*, 426 U.S. 167 (1976).

¹⁶¹*EPA v. California State Water Resources Control*, 426 U.S. 200 (1976).

in the case. The court then held that Congress had waived sovereign immunity under RCRA.¹⁶²

While a discussion of the Clean Water Act waiver of sovereign immunity is beyond the scope of this paper, it is important to note that SBA argued that the provisions of the Pennsylvania Clean Streams Law (CSL) which made discharges of pollutants into Pennsylvania rivers a "nuisance," could not be provisions that were covered by the waiver of sovereign immunity because "whether an act constitutes a nuisance cannot be accomplished by predetermined standards."¹⁶³ The court again disagreed and found that the statute provided factors that had to be considered in reaching the conclusion that the discharge constituted a nuisance, and Congress had waived sovereign immunity under the Clean Water Act even in this case.¹⁶⁴

Finally, the court turned to the waiver of sovereign immunity under CERCLA.¹⁶⁵ SBA argued that the Pennsylvania laws DER relied on did not apply to removal or remedial action. The court disagreed.¹⁶⁶ The court stated although the Pennsylvania laws DER relied on did not use the word "cleanup" they "clearly encompass[e]d cleanup of hazardous waste sites."¹⁶⁷ The court found the only

¹⁶²134 Pa. Commw. at 474.

¹⁶³*Id.* at 475-76.

¹⁶⁴*Id.* at 476.

¹⁶⁵42 U.S.C. § 9620.

¹⁶⁶134 Pa. Commw. at 476.

¹⁶⁷*Id.* at 477.

limitation in § 120(a)(4) was the anti-discrimination clause. SBA further argued that Pennsylvania's Hazardous Sites Cleanup Act (HSCA) is aimed at cleanup of hazardous substances improperly disposed of and was the appropriate statute to be used. The court again disagreed. It found the language of HSCA precluded using that statute if other state statutes were applicable. Since it had held that SWMA and CSL were both applicable, those laws should be applied first. The court then granted DER's motion for partial summary judgment holding that SBA's sovereign immunity defenses were waived.¹⁶⁸

The Federal District Court for the Middle District of Pennsylvania, building on the foundation laid by the Pennsylvania Commonwealth Court in *Commonwealth, DER v. SBA*¹⁶⁹ also took an expansive view of the term "requirement" in *United States v. Pennsylvania*.¹⁷⁰ There, the United States sought declaratory and injunctive relief against the Pennsylvania Department of Environmental Resources (DER), seeking a ruling, on the ground of sovereign immunity, that DER could not exercise jurisdiction over a contaminated drainageway located at a federal facility. The drainageway was on federal property and carried storm water runoff from the facility. DER, after testing the soils and finding metals and polychlorinated biphenyls (PCBs), issued an order under state law directing the Navy to assess the contamination and establish a cleanup schedule. The order was based on the waiver of sovereign immunity in three statutes: CERCLA,

¹⁶⁸*Id.* at 477-78.

¹⁶⁹134 Pa. Commw. 468, 579 A.2d 1001 (1990) (en banc).

¹⁷⁰778 F. Supp. 1328 (M.D. Penn. 1991).

RCRA, and the Clean Water Act. In its analysis of the three waivers the Federal District Court for the Middle District of Pennsylvania said the first principle is that waivers of sovereign immunity must be express and strictly construed in the government's favor. Concerning the CERCLA waiver, the government argued that waiver only applied to states with mini-CERCLAs, and which would require "specific, predetermined standards for the cleanup of waste." The court relied on the broad definition of the terms "removal" and "remedial action" and found the waiver broad enough to cover the Pennsylvania laws.¹⁷¹

The court next dealt with the waivers of sovereign immunity in RCRA and the Clean Water Act. The government again argued that the requirements waived under these statutes must be "objectively quantifiable effluent limitations [or] standards" and cited cases as authority. The court did not try to distinguish those cases, it just disagreed with them.¹⁷²

ENFORCEMENT

In spite of the pre-SARA decision the *Silverx* case it appears that courts are willing to find a waiver of sovereign immunity when it comes to applying state cleanup laws to federal facilities for cleaning up hazardous waste. But, even when Congress has decided

¹⁷¹*Id.* at 1332.

¹⁷²*Id.* at 1333. Based on the text of the court's opinion, it does not appear that the Navy had "clean hands" in this case as they had in *Silverx*. The discussion implies that the Navy had not started its own cleanup, but was just arguing waiver of sovereign immunity. The Navy would have been in a better position if they were arguing they had a cleanup already underway. It seems uncontroverted that there was contamination on federal land that needed to be cleaned up.

that states will have oversight or enforcement authority, it has not given the states all the enforcement tools potentially available to ensure compliance with applicable laws. One of the first cases to look at the availability of criminal sanctions against the United States under RCRA was *People of the State of California v. Walters*.¹⁷³ In this case, the city attorney for Los Angeles brought criminal suit against the Veterans Administration and against the administrator of a Veterans Hospital alleging disposal of hazardous medical waste in violation of California law. The case was removed to federal district court where it was dismissed on the grounds that the defendants were protected by sovereign immunity. The city attorney appealed and the 9th Circuit affirmed. The court held that criminal sanctions were

not a "requirement" of state law within the meaning of [42 U.S.C.] § 6961, but rather the means by which the standards, permits, and reporting duties are enforced. Section 6961 plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions.¹⁷⁴

Turning from criminal penalties to civil penalties, before 1992 there was a split in the courts as to whether sovereign immunity was waived under RCRA for civil penalties.¹⁷⁵ The issue was settled by the U.S. Supreme Court in the case of *U.S.*

¹⁷³751 F.2d 977 (1985).

¹⁷⁴*Id.* at 978. The court also pointed out that the parties had agreed that the action was essentially against the United States and it did not necessarily apply to all prosecutions against federal officers or federal agencies.

¹⁷⁵Circuit court cases that held sovereign immunity was not waived for civil penalties included *Mitzelfelt v. Department of the Air Force* 903 F.2d 1293 (10th Cir. 1990), *United States v. State of Washington* 872 F.2d 874 (9th Cir. 1989), and *Ohio v. U.S. Department of Energy* 904 F.2d 1058 (6th Cir. 1990). Cases that held sovereign immunity was waived included *Maine v. Dept of the Navy*, 702 F. Supp. 322 (Dist. of
(continued...)

Department of Energy v. Ohio (DoE).¹⁷⁶ This case arose out of litigation concerning the DoE plant at Fernald, Ohio. The issues before the Court were whether Congress had waived sovereign immunity for civil fines imposed by the State against a federal agency for past violations of the Clean Water Act or RCRA. The Court held that Congress did not in either statute. In analyzing this case, the Court divided fines into two types: coercive and punitive. "Coercive fines" were defined by the Court as "fines imposed to induce [federal agencies] to comply with injunctions or other judicial orders designed to modify behavior prospectively."¹⁷⁷ The Court defined "punitive fines" as fines "imposed to punish past violations."¹⁷⁸ It was conceded by DoE that it would be liable for coercive fines. The only issue was liability for punitive fines. The State in *DoE* sued under two RCRA provisions: the federal facilities provision¹⁷⁹ and the citizen suit provision.¹⁸⁰ The State was allowed to use the citizen suit provision because it was defined as a person under the statute.¹⁸¹ The Court found that the United States could be sued under the citizen suit provision. It found civil penalties are mentioned in the

¹⁷⁵(...continued)

Maine 1988), and *Energy Dept. v. Ohio*, 689 F. Supp 760 (Dist. S. Ohio 1988), *rev'd* (on this issue under § 6001), 904 F.2d 1058 (6th Cir. 1990), *aff'd* (on this issue under § 6001), 112 S.Ct. 1627 (1992).

¹⁷⁶112 S.Ct. 1627 (1992).

¹⁷⁷112 S.Ct. at 1632.

¹⁷⁸*Id.*

¹⁷⁹42 U.S.C.A. § 6961 (1983 & Westlaw 1993).

¹⁸⁰42 U.S.C.A. § 6972 (1983 & West Supp. 1993).

¹⁸¹42 U.S.C.A. § 6903(15) (1983 & West Supp. 1993).

citizen suit provision,¹⁸² but are only applied to persons,¹⁸³ and since the United States was not a person¹⁸⁴ under the civil penalties portion of the statute, civil penalties were not applicable to the United States.¹⁸⁵ There had not been an "unequivocal" waiver of sovereign immunity.¹⁸⁶ The court then turned to the federal facilities provision of RCRA to determine if there had been a waiver of sovereign immunity for punitive fines. It is interesting to note the decision had a 6-3 split except for the interpretation of this provision, which was 9-0. The Court found in reviewing the language of the federal facilities provision civil penalties were not mentioned, while sanctions with respect to the enforcement of injunctive relief were. This in the view of the Supreme Court, clearly showed Congress' intent to exclude punitive fines.

¹⁸²This was an HSWA amendment to 42 U.S.C. § 6972(a). These civil penalties would be paid to the U.S. Treasury. The legislative history does not shed any light on whether Congress meant the United States to be subject to "punitive fines," *see*, 2 RCRA LEGIS. HIST., *supra* note 42, at 1252, 1453-54, 1529-30, 2009, and 2081-83.

¹⁸³42 U.S.C.A. § 6928(g) (1983 & West Supp. 1993).

¹⁸⁴While the Court did not mention it, none of the three bills which were the precursor to RCRA defined the United States as a person. This appears intentional, *see*, 1 RCRA LEGIS. HIST., *supra* note 42, at 308, 343, 353, 448, 613, and 716. The Federal Facilities Compliance Act of 1992, Pub. L. No. 102-886, 106 Stat. 1505, 1507 (1992), changed this and included the United States in the definition of person under RCRA, *see* 42 U.S.C.A. § 6903(15)(1983 & Westlaw 1993).

¹⁸⁵112 S.Ct. at 1635.

¹⁸⁶*Id.*

THE FEDERAL FACILITIES COMPLIANCE ACT OF 1992

The Federal Facilities Compliance Act of 1992¹⁸⁷ gave the states another enforcement tool. Shortly, after the decision *U.S. Department of Energy V. Ohio*¹⁸⁸ Congress decided that it was going to waive sovereign immunity for punitive fines under RCRA.

The first hearing concerning federal facility compliance, which led to this bill, was held on 28 April 1987, by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce.¹⁸⁹ Between then and when the bill was passed 5½ years later a total of eight Congressional hearings were held and six Congressional reports were issued, all before the U.S. Supreme Court published its decision in *U.S. Department of Energy v. Ohio*.¹⁹⁰

The Administration opposed the bill until shortly before it was passed. Its two main concerns were that states would raid the federal treasury¹⁹¹ and that states with aggressive prosecution programs could disrupt the federal government priority of

¹⁸⁷Pub. L. No. 102-886, 106 Stat. 1505 (1992).

¹⁸⁸112 S.Ct. 1627 (1992).

¹⁸⁹*Environmental Compliance by Federal Agencies: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987).

¹⁹⁰112 S.Ct. 1627 (1992).

¹⁹¹*Environmental Compliance by Federal Agencies: Hearings on H.R. 1056 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 95 (1989) (prepared statement of William H. Parker III, Deputy Assistant Secretary of Defense [Environment]).

cleanup.¹⁹² Both of these fears were in the context of cleanup under the corrective action sections of RCRA, not compliance.¹⁹³ By the 102d Congress, Senator Mitchell, the Senate Majority Leader, took a personal interest in the legislation and it appeared certain it would pass. The Administration changed its strategy from outright opposition to trying to get favorable amendments to resolve problem areas in RCRA for federal facilities. There was also a change in attitude that environmental compliance could best be had by working with, rather than against, the states.¹⁹⁴ The administration offered eleven amendments, none concerning corrective action directly.¹⁹⁵ The compromise bill was passed by both houses and signed into law on October 6, 1992. In its final version, the bill maintained sovereign immunity for criminal sanctions and waived sovereign immunity for punitive fines.

¹⁹²*Id.* at 113-4 (prepared statement of Donald Carr, Acting Assistant Attorney General, Land and Natural Resources Division, DOJ).

¹⁹³*Department of Defense Environmental Programs: Hearings Before the Readiness Subcomm., the Environmental Restoration Panel, the Dept. of Energy Defense Nuclear Facilities Panel of the House Comm. on Armed Services, 102d Cong., 1st Sess. 758 (1991).*

¹⁹⁴Laurent R. Hourcle and William J. McGowan, *Federal Facility Compliance Act of 1992: Its Provisions and Consequences*, FEDERAL FACILITIES ENVIRONMENTAL JOURNAL., Winter 1992-93, at 362, 363.

¹⁹⁵*Department of Defense Environmental Programs: Hearings Before the Readiness Subcomm., the Environmental Restoration Panel, the Dept. of Energy Defense Nuclear Facilities Panel of the House Comm. on Armed Services, 102d Cong., 1st Sess. 715-34 (1991).* There were amendments on military essential activities, public vessels, wastewater treatment works, payment of state administrative fees, federal employee liability, additional assessments, EPA reimbursement, fines and penalties limited to environmental uses, and three amendments that dealt with mixed waste. Of these, munitions, public vessels, wastewater treatment works, payment of state administrative fees, fines and penalties limited to environmental uses, and mixed waste were addressed by Congress. While not specifically addressed in the law as passed, federal employee criminal liability was mentioned in the conference report.

CONSTITUTIONAL CONSIDERATIONS

While it is clear that federal agencies can be subject to "requirements" of state law if there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation 'clear and unambiguous,'"¹⁹⁶ Congress can waive sovereign immunity in ways that are defective under the Constitution. Ours is a federal system with state and federal government sovereigns. Under our Constitution the federal government is supreme,¹⁹⁷ but is a government of delegated powers. Powers not delegated to the United States by the Constitution, nor prohibited by the Constitution to the states, are reserved to the states and to the people.¹⁹⁸ Thus, in any constitutional analysis of federal action, the first issue is whether or not the power has been delegated to the federal government.

Besides the issue of whether the federal government has the power to act, there is also the issue of how the three branches of the federal government relate to each other. The three separate branches of our federal government provide checks and balances on each others' operation. Our founding fathers had a fear of the legislature and the power that it might try to take. There are two separation-of-powers doctrines that may have applicability to a discussion of the states' relationship to federal agencies hazardous waste cleanup. They are the delegation of legislative authority and the appointment clause arguments.

¹⁹⁶Hancock v. Train, 426 U.S. 167, 179 (1976).

¹⁹⁷Supremacy Clause, U.S. CONST. art. VI, cl. 2.

¹⁹⁸U.S. CONST. amend. X.

Before looking at those two areas, however, it must be determined whether or not separation-of-powers, a horizontal doctrine which defines the relationship among the three branches of the federal government, can be used vertically between the states and the federal government. It appears it can, in the right circumstances. In the case of *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,¹⁹⁹ the U.S. Supreme Court dealt with this issue. In this case the Court invalidated a Board of Review (Board) of the Metropolitan Washington Airports Authority (MWAA), which was a creature of state law, on the basis of the separation-of-powers doctrine.

In this case the Board was established by bylaws of MWAA (which was created by legislation of Virginia and the District of Columbia).²⁰⁰ The Court found three factors that justified its finding that the Board was subject to the separation-of-powers analysis. The first was control of the two airports under MWAA, National and Dulles, was originally under the federal government, and it was only transferred if the states would create the Board. The second was the federal government still had a strong interest in the "efficient operation of the airports." And finally, the membership of the Board was restricted "to federal officials, specifically members of congressional committees charged with authority over air transportation."²⁰¹ Under the legislation the members of Congress served in their individual capacities; however, the Court held

¹⁹⁹111 S.Ct. 2298 (1991).

²⁰⁰*Id.* at 2306. The Court for the purposes of this case treated the District of Columbia as if it were a state.

²⁰¹*Id.* at 2307.

that language did "not prevent this group of officials from qualifying as a congressional agent exercising federal authority for separation-of-powers purposes."²⁰² The Court stated separation-of-powers analysis does not depend on the labeling of the activity.

The Court said it confronted

an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials. Such an entity necessarily exercises sufficient federal power as an agent of Congress to mandate separation-of-powers scrutiny. Any other conclusion would permit Congress to evade the "carefully crafted" constraints of the Constitution, simply by delegating primary responsibility for execution of national policy to the States, subject to the veto power of Members of Congress acting "in their individual capacities."²⁰³

The MWAA argued that the Board was legal because it could be formed under the power found in the property clause. The Court disagreed. In moving to the separation-of-powers analysis the Court said that there were two basic constraints on the Congress that forestall the danger of its encroachment "beyond the legislative sphere."²⁰⁴

It may not "invest itself or its Members with either executive power or judicial power." And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I.²⁰⁵

²⁰²*Id.*

²⁰³*Id.* at 2308.

²⁰⁴*Id.* at 2311.

²⁰⁵*Id.*

The Court said it did not have to determine whether the power the Board exercised was executive or legislative, but found that the conduct of the Board did violate the separation-of-powers doctrine.²⁰⁶

The three person dissent²⁰⁷ said this was the first time that the Court had employed the "separation-of-powers doctrine to invalidate a body created under state law."²⁰⁸ The dissent found the MWAA and the Board were "clearly creatures of state law,"²⁰⁹ and that the Board did not exercise federal power.²¹⁰ The dissent also took at face value that the members of Congress served on the Board in their individual capacities and concluded that it did not violate the separation-of-powers doctrine.²¹¹

In the right factual circumstances a separation-of-powers argument may be appropriate even though one is dealing with an allocation of power between the federal government and the state governments, two sovereigns. The analysis depends on the substance and not the form of the arrangement.

LEGISLATIVE DELEGATION

The first separation-of-powers argument is delegation of legislative authority. Very few cases have found laws invalid because of improper delegation and those cases

²⁰⁶*Id.* at 2312.

²⁰⁷Justice White wrote the dissent and was joined by The Chief Justice and Justice Marshall.

²⁰⁸111 S.Ct. at 2313.

²⁰⁹*Id.*

²¹⁰*Id.* at 2317.

²¹¹*Id.* at 2320-21.

are old. The first case in which the U.S. Supreme Court invalidated a congressional delegation was *Panama Refining Co. v. Ryan*.²¹² In this case Congress had delegated the authority to prevent transportation of oil in interstate or foreign commerce that was in excess of production allowed by state laws or regulations. The Court held that the delegation established "no criteria to govern the President's course," and was thus invalid.²¹³ The Court held that Congress could delegate its authority but there had to be ascertainable standards. In two other cases, *Schechter Poultry Corp. v. United States*²¹⁴ and *Carter v. Carter Coal Co.*,²¹⁵ the Court struck down laws delegating legislative power to private groups. In both of these cases the Court felt that Congress had not given an "adequate definition of the subject to which the codes are to be addressed."²¹⁶ Again the issue was whether there were ascertainable standards. While of historical interest these cases are of little importance. Since the 1930s the Court has upheld broad delegations of legislative authority and with the detail of modern command and control environmental statutes it is likely a court will find there are ascertainable standards.

²¹²293 U.S. 388 (1935). See, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 287 n. 10 (1978).

²¹³*Id.* at 415.

²¹⁴295 U.S. 495 (1935).

²¹⁵298 U.S. 238 (1936).

²¹⁶295 U.S. at 531.

APPOINTMENTS CLAUSE

Another possible constitutional argument can be base on the appointments clause.

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.²¹⁷

The seminal case on the appointments clause is *Buckley v. Valeo*.²¹⁸ In this case the constitutionality of the Federal Election Campaign Act was challenged. As part of that Act a Federal Election Commission was established. This was an eight person committee that was given the power to administer and enforce the Federal Election Campaign Act. It had not only record keeping, disclosure and investigative functions, but also extensive rule-making and adjudicative powers. The enforcement power was direct and wide ranging. Of the eight members, two were appointed by the President pro tempore of the Senate, two were appointed by the Speaker of the House of Representatives, and two were appointed by the President but had to be confirmed by a majority of the Senate and House of Representatives. The final two members were the Secretary of the Senate and the Clerk of the House of Representatives, neither of whom had a vote.²¹⁹ The Court first found that these members were not appointed in accordance with the appointments clause. It then went on to determine which functions

²¹⁷U.S. CONST. art. II, § 2, cl. 2.

²¹⁸424 U.S. 1 (1976).

²¹⁹*Id.* at 109-13.

this Commissioners could exercise. The Court found that the Commission had three types of functions: functions relating to investigation and of an informational nature; functions with respect to fleshing out the statutory rule making and advisory opinions; and functions relating to enforcement, such as compliance, administrative determinations and hearings, and civil suits.²²⁰

Since the powers of investigative and informational nature could have been delegated to a committee in Congress, the Court found them a permissible exercise for the current Commission.

The Court held the provisions giving the Commission responsibility for conducting civil litigation in the courts of the United States for vindicating public rights violated the appointments clause, and that "[s]uch functions may be discharged only by persons who are 'Officers of the United States' within the language of that section."²²¹ The Court defined the term "Officers of the United States," as used in Art. II of the U.S. Constitution, to include any person "exercising significant authority pursuant to the laws of the United States" and stated that person must be appointed under the appointments clause. The term was intended to have substantive meaning.²²²

The Court also held the provisions which gave the Commission broad administrative powers, such as, "rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself" were more legislative than

²²⁰*Id.* at 137.

²²¹*Id.* at 140.

²²²*Id.* at 125-26.

judicial, and were exercised free from the "day-to-day supervision of either Congress or the Executive Branch." These types of duties were normally performed by independent regulatory agencies or a department in the Executive Branch under the direction of an Act of Congress. The functions of the commission were not just to facilitate the ability of Congress to legislate, nor was it much different from "the administration and enforcement of public law." The Court held that the administrative functions of the Commission could only be exercised by "Officers of the United States."²²³

Again, it must be noted that this is a separation-of-powers doctrine which distinguishes it from state enforcement of hazardous waste laws. Does the same principle apply to vertical relations between two sovereigns in our federal system; *Metropolitan Washington*²²⁴ seems to indicate it can. A case that has looked at this issue even closer is *Seattle Master Builders Assn. v. Pacific Northwest Electric Power and Conservation Planning Council*.²²⁵ In this case a group of home builders and other industry representatives sought to strike down both the Pacific Northwest Electric Power and Conservation Planning Council (hereinafter Council) and the Council's 1983 Northwest Conservation and Electric Power Plan as unconstitutional.²²⁶ They sought relief not only from the Council but also from the United States government, which had intervened on behalf of the Bonneville Power Administration (BPA), an agency of the United States

²²³*Id.* at 140-41.

²²⁴111 S. Ct. 2298 (1991).

²²⁵786 F.2d 1359 (9th Cir. 1986).

²²⁶*Id.* at 1362.

Department of Energy. BPA was responsible for the production, marketing and distribution of electric power in the Pacific Northwest. The Council's responsibility was to develop a plan for conservation and electricity use in the area served by BPA ' and to develop a program for energy planning consistent with regional environmental and ecological concerns."²²⁷ Congress had consented to the establishment of the Council. Four states passed legislation which allowed them to participate in the Council and authorized each governor to appoint two members to the Council.²²⁸

The plaintiffs in this case had three arguments against the Council. The third one, the one pertinent to this paper, was that the Council violated the appointments clause because the Council exercised significant authority over the federal government and its members had not been appointed by the President but by the governors of several states.²²⁹

The plaintiffs argued, citing *Buckley*,²³⁰ "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed" by the President and, therefore, the appointment of Council members by the state governors violated *Buckley*. In its analysis the court stated that the plaintiffs went too far in their argument. Under their theory virtually all

²²⁷*Id.*

²²⁸*Id.*

²²⁹*Id.* at 1362-63. The plaintiffs also attacked the Plan as being arbitrary and capricious under the Act and under the Administrative Procedures Act. The second argument was that Council could not constitutionally be an interstate compact organization.

²³⁰*Buckley v. Valeo*, 424 U.S. 1 (1976).

compacts would be unconstitutional "because all or most of them impact federal activities and all or most of them have members appointed by the participating states."²³¹

The court first held that there was no prohibition against federal agencies following policies set by nonfederal agencies. The federal government can and has "agreed to be bound by state law in several areas."²³² The court then went on to look at the appointment of members of the Council. It first found, "No court has yet held that the appointments clause prohibits the creation of an interstate planning council with members appointed by the states."²³³ In analyzing the appointment clause issue the court in this case turned to *Buckley*²³⁴ for guidance. This court set out the *Buckley* test as "The appointments clause applies to (1) all executive or administrative officers; (2) who serve pursuant to federal law; and, (3) who exercise significant authority over federal government actions."²³⁵

The court stated there is no violation of the appointments clause unless all three prongs of the *Buckley* test are met. In this case the court held that the Council members were not performing their duties under the laws of the United States. Instead, the Council members were performing their duties under the compact that required both the approval of the state legislatures and the Congress. The court went on to say without

²³¹786 F.2d at 1365.

²³²*Id.* at 1364.

²³³*Id.* at 1365.

²³⁴*Buckley v. Valeo*, 424 U.S. 1 (1976).

²³⁵786 F.2d at 1365. *See, Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

state legislation there would be no Council nor Council members. While the court acknowledged that the Congressional approval of the compact gave some of the attributes of federal law, it found that the Council members were appointed by the states, they were paid and operated under the laws of the respective states (though within the parameters of the Act), and it was the states that empowered the Council members to act. The role of Congress was to authorize the formation of the Council, as it does almost all compacts, and their attendant agencies. The court also acknowledged that federal law did affect the policy-making of the Council by constraints placed on the policy-making of the Council and some of the Council's operations were subject to federal law.

Since the Council did not serve "pursuant to federal law" the court found it unnecessary to consider the first and third prongs of the *Buckley* test. The court then went on to say that *Buckley* was about separation-of-powers within the federal government. This was not a case where Congress was trying to usurp the power of the President for itself. The court found that since Congress neither appointed nor could remove members from the Council "the balance of powers between Congress and the President is unaffected."²³⁶

As a final note the court found,

The Act establishes an innovative system of cooperative federalism under which the states, within limits provided in the Act, can represent their shared interests in the maintenance and development of a power supply in the Pacific Northwest and in related environmental concerns.²³⁷

²³⁶*Id.*

²³⁷*Id.* at 1366.

The dissent in this case raises several interesting points that need to be examined. The first question the dissenting judge answered was whether the Council was an interstate compact agency. The dissent found that it was not an ordinary interstate compact agency. At best it was a federal agency created through the interstate compact process and at worst it was a federal agency whose members were appointed by state governors.²³⁸ After determining that the Council was more in the nature of a federal agency, the next issue the judge faced was whether the appointments clause was applicable to interstate compacts. Under *Buckley* the Council argued it was not subject to the appointments clause because the appointments clause only applied to employees of the federal government. The dissent said that the Council misread *Buckley*. It was concerned not with the status but the actual power and authority that the Commission in that case had. He stated the issue was whether the council members exercised "significant authority pursuant to the laws of the United States."²³⁹ The Council had next argued that *Buckley* was not applicable because this situation did not present a separation-of-powers issue. The dissent pointed out that it was a separation-of-powers case because the Congress and the states were usurping the President's power to nominate federal officials, and to the extent that a state entity was exercising control over exclusively federal functions. The dissent stated there was no language in the appointments clause that would restrict it to separation-of-powers situations²⁴⁰ and went

²³⁸*Id.* at 1373.

²³⁹*Id.* at 1375.

²⁴⁰*Id.* at 1375 n.4.

on to find that the Council did exercise significant authority under federal law (the Pacific Northwest Electric Power Planning Act).²⁴¹ The dissent had pointed out that Congressional consent did transform an interstate compact into the law of the United States.²⁴² It then discussed four types of state officers that the Council said the dissent's view would make federal officials under *Buckley*. The first group were state officials who spend federal money. The dissent said

First, these officials do not exercise significant authority under federal law. They do not decide whether funds will be granted or the size of the grant. Second, these officials do not exercise control over the actions of federal officials. Third, these state officials have no authority at all until the funds are received by the state. At that point, the funds are, in effect, state funds.²⁴³

The second group of state officials who can exercise control over exclusively federal functions were state judges, since they decide federal issues. The dissent pointed out that the state judge's authority derives solely from state law. "The Supremacy Clause requires state judges to obey federal law, but does not allow those judges to change or to create federal law."²⁴⁴

²⁴¹16 U.S.C. § 839-839h. The majority on the other hand found that the Council was empowered by state law. That the appointment, salaries and administrative operations of the Council were under state law. While the majority admitted this law did provide guidance it found, "The appointment, salaries and direction of the Council members are state-derived." 786 F.2d at 1365.

²⁴²786 F.2d at 1375-76 & 1373.

²⁴³*Id.* at 1376.

²⁴⁴*Id.* at 1376-77.

The third group were state legislators. However the dissent pointed out

To the extent that state statutes do not discriminate against federal entities or interfere with federal activities, federal agencies are subject to those statutes. In some cases, Congress specifies that federal entities must obey state laws that would otherwise be preempted. In those cases, Congress has merely narrowed the scope of federal preemption. The state legislatures are not authorized to pass legislation solely for the purpose of regulating federal agencies.²⁴⁵

The fourth group were members of ordinary interstate compact agencies. The dissent said that a "compact operates as federal law in the sense that construction of the compact's terms presents a federal question and that state law is not a defense to noncompliance with the compact's terms," but the Council was not an ordinary compact. It was not created for a state purpose. The dissent went on to give examples of how it could have been legal. If its authority was to coordinate energy planning at the state level, that would be constitutionally permissible. Congress could have delegated authority to the Council over regional energy production and distribution for the states in that region, but Congress could "not retain that authority in a federal executive agency (BPA) and create or approve a state-appointed body (the Council) that may subject that executive agency, at least in part, to its control." What the dissent found dispositive was that this compact agency could at least partially bind BPA, a federal agency, and that equalled significant authority under federal law and thus was constitutionally deficient.²⁴⁶

²⁴⁵*Id.* at 1377.

²⁴⁶*Id.* The final argument that the dissent looked at was "innovative federalism." He stated the Council was arguing that the constitution should be relaxed for policy reasons. The dissent said the Supreme Court had rejected this argument. "Extraordinary conditions do not create or enlarge constitutional power." He then cited *INS v. Chandra*,
(continued...)

In looking at the various ways that state law could apply to federal facilities and applying the Buckley 3 part test, it is clear that state laws not delegated by the federal government would clearly not violate the *Buckley* test. The state officials clearly would not serve pursuant to federal law. Even those states that have delegated programs under Subtitle C of RCRA would not violate the *Buckley* test, since the laws are enacted by the state legislatures and are not federal laws. CERCLA is a non-delegated program, so any cleanup laws under state mini-CERCLAs would clearly not violate the *Buckley* test.²⁴⁷

²⁴⁶(...continued)

462 U.S. 919, 959 (1983)

The choices we discern as having been made in the Constitutional Convention impose burdens on government processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

The dissent then stated that the Council could not be upheld as an innovative approach to cooperative federalism. *Id.* at 1378.

²⁴⁷An example where Congress may have violated the appointments clause is under the Medical Waste Act, § 11007(a). It reads:

A State may conduct inspections under 6992c of this title and take enforcement actions under section 6992d of this title against any person, including any person who has imported medical waste into a State in violation of the requirements of, or regulations under, this subchapter, to the same extent at the Administrator. At the time a State, initiates an enforcement action under section 6992d of this title against any person, the State shall notify the Administrator in writing.(42 U.S.C. § 6992f(a)(West Supp. 1993))

(continued...)

It is possible for Congress to go too far in waiving sovereign immunity, but it has not done so under RCRA § 6001 or CERCLA § 120. Not only has Congress provided ascertainable standards, it has provided the possibility of presidential waivers, congressional oversight, and allowed the states to enforce *their* laws. While the sovereign immunity waivers of the two laws are constitutional, the two laws overlap. Congress left it to EPA to figure out how to deal with this overlap.

RCRA-CERCLA OVERLAP

RCRA, as it was enacted, was a prospective statute. To deal with cleanups Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).²⁴⁸ With the enactment of HSWA and SARA there was clearly overlap between the new RCRA corrective action provisions and cleanup under CERCLA. This appears intentional on the part of Congress. It was left up to EPA to figure out how to deal with the overlap.

The year after EPA amended the NCP to allow listing federal facilities on the NPL, EPA decided to defer listing non-federal facility sites on the NPL that were subject

²⁴⁷(...continued)

In his signing statement the President opined that "To the extent that Congress provided for States to prosecute crimes or exercise other executive branch authority, it could be inconsistent with the Appointments Clause of the Constitution." (President's Statement on Signing the Medical Waste Tracking Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1418 (Nov. 2, 1988)). The President is probably correct. If state officials enforce federal law in the place of the Administrator, an official that is appointed under the appointments clause, that person would have to be appointed under the appointments clause, or at the very least would be an inferior official under that clause.

²⁴⁸42 U.S.C.A. §§ 9601-9675 (1983 & West Supp. 1993).

to RCRA corrective action except under certain limited circumstances.²⁴⁹ This is known as the RCRA deferral policy. When it published its final Agency policy on this subject, EPA stated the application of the policy with respect to federal facilities would be addressed later.²⁵⁰

One of the reasons that RCRA corrective action under HSWA was such a powerful tool was the property-wide definition of "facility" adopted by EPA. In carrying out the dictates of Congress, EPA had earlier defined the term "facility" broadly. It included not only those portions of a treatment, storage, and disposal (TSD) facility on which units for managing solid or hazardous waste were located, but also included all contiguous property under the owner or operator's control.²⁵¹ This definition was not immediately applied to federal facilities.²⁵² The next year, and several months before EPA published its deferral policy, it decided to apply its property-wide definition of a facility to federal facilities. EPA stated "RCRA section 3004(u) subjects federal facilities to corrective action requirements to the same extent as any facility owned or operated by private parties" and "the statute requires federal agencies to operate under the same property-wide definition of 'facility'."²⁵³ Congress noted this with approval as it

²⁴⁹Amendment to National Oil and Hazardous Substances Contingency Plan; National Priorities List, 51 Fed. Reg. 21054, 21057 (1986).

²⁵⁰*Id.* at 21059.

²⁵¹Hazardous Waste Management System; Final Codification Rule, 50 Fed. Reg. 28702, 28712 (1985) (definition of a "facility" codified at 40 C.F.R. § 260.10 (1992)).

²⁵²*Id.*

²⁵³Hazardous Waste Management System; Supplement to Preamble to Final Codification Rule, 51 Fed. Reg. 7722 (1986).

completed work on SARA.²⁵⁴ EPA found that most of the federal facilities that could be placed on the NPL were RCRA regulated hazardous waste management units within federal facilities. Applying the boundary policy and the RCRA deferral policy to federal facilities would result in very few them being placed on the NPL, thus there would be little potential for overlap between RCRA and CERCLA.²⁵⁵

This all changed in 1986 when CERCLA was amended by SARA. When § 120²⁵⁶ was added to CERCLA, it directly addressed federal facilities and established a comprehensive system of site identification and evaluation. Under § 120(c) EPA was to establish a special "Federal Agency Compliance Docket." The docket was based heavily on information provided by federal facilities subject to RCRA.²⁵⁷ The second step, under § 120(d), required EPA to perform a preliminary assessment using the Hazard Ranking System developed under the authority of § 105 of CERCLA. If the federal facility met the criteria it was to be placed on the NPL. The next step was to start a CERCLA cleanup under § 120(e), first with consultation of EPA and the state, and then memorializing the clean up in an interagency agreement between the federal department, agency, or instrumentality and EPA. Under § 120(f) state and local officials were given the opportunity to participate. This process under § 120 was unique to

²⁵⁴H. CONF. REP. NO. 962, 99th Cong., 1st Sess. 242 (1986), *reprinted in* 6 SARA LEGIS. HIST., *supra* note 102, at 5058.

²⁵⁵The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities, 54 Fed. Reg. 10520, 10522 (1989).

²⁵⁶42 U.S.C.A. § 9620 (West Supp. 1993).

²⁵⁷The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities, 54 Fed. Reg. 10520, 10521 (1989).

federal facilities.²⁵⁸ EPA realized that by taking action under CERCLA on sites subject to RCRA there was a "risk of overlap or even conflict."²⁵⁹ EPA laid responsibility for this conflict on Congress for enacting statutes with overlapping corrective action authority.²⁶⁰ It was EPA's position to deal with each site comprehensively under CERCLA through an interagency agreement, under § 120(e), signed by the federal facility, EPA, and, where possible, the state. EPA also realized it might be more advantageous to divide a site and give authority over the various parts to the parties.²⁶¹ Reading § 120(a)(4)²⁶² it would appear that this would not affect non-NPL sites as that section says that state law applies to non-NPL sites; however, nothing is as clear as it seems. Under CERCLA § 122(e)(6)²⁶³ entitled "Inconsistent response action," there is a prohibition against any potentially responsible party taking any remedial action at a facility unless authorized by the President. The event that triggers this prohibition is not listing a site on the NPL but the initiation of a CERCLA remedial investigation and

²⁵⁸*Id.* at 10522.

²⁵⁹*Id.*

²⁶⁰*Id.*

²⁶¹*Id.* at 10523.

²⁶²Federal Facilities, 42 U.S.C.A. § 9620(a)(4)(West Supp. 1993), "State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality."

²⁶³42 U.S.C.A. § 9622(e)(6)(West Supp. 1993).

feasibility study (RI/FS)²⁶⁴ for that particular facility. Under Executive Order 12580 the President has delegated his authority to continue remedial action after an RI/FS to the Administrator of EPA for NPL sites, and for non-NPL sites the general authority has been delegated to the federal agency for sites under their jurisdiction or control.²⁶⁵ It was EPA's position that this section "trumped" RCRA corrective action at NPL sites, and required EPA approval of state directed RCRA corrective action.²⁶⁶ At non-NPL sites EPA indicated that the more specific § 120(a)(4) would take precedence over the more general § 122(e)(6).²⁶⁷

Even though it appears Congress put this section in CERCLA to prevent PRPs from starting inconsistent remedial action, EPA's position is reasonable and under *Chevron*²⁶⁸ should be given deference by the courts, particularly since EPA is reconciling the conflicting policies of RCRA corrective action and CERCLA cleanup.²⁶⁹

²⁶⁴An RI is a process undertaken by the lead agency to determine the nature and extent of the problem presented by the release and an FS means a study undertaken by the lead agency to develop and evaluate options for remedial action (40 C.F.R. § 300.5 (1992)).

²⁶⁵Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (1987).

²⁶⁶The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities, 54 Fed. Reg. 10520, 10523 (1989).

²⁶⁷*Id.* at 10524.

²⁶⁸*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

²⁶⁹Under *Chevron* when a court reviews an agency's interpretation of a statute it administers, there is a two step analysis. First, if Congress has spoken to the precise question that ends the matter. Second, if not, and the statute is silent or ambiguous the issue is whether the agency's interpretation is based on a permissible construction of the statute. In this case, the Court stated, "We have long recognized that considerable
(continued...)

In so doing EPA decided the RCRA deferral policy was not applicable to federal agencies. This decision has created an area of overlap and some potential problems which EPA recognizes and is trying to deal with.²⁷⁰ Federal agencies not only have to deal with the tension of clean up under RCRA versus clean up under CERCLA, or what rules will be used in cleaning up, but they also have the additional problem of who will be in charge: the state, the federal regulatee, or EPA (federal regulator). These are the same policy questions Congress was supposed to have answered when RCRA was enacted in 1976. This was recognized as a contentious issue by the House Committee on Interstate and Foreign Commerce in its report on its version of RCRA²⁷¹ and it tried to deal with this problem by having EPA regulate other federal agencies. This approach was not adopted because Congress wanted the federal government to be treated like everyone else, subject to all law, state, federal and local. Unfortunately, federal agencies are not like everyone else, so this approach has led to litigation and frustration on all sides.

UNITED STATES V. COLORADO

The one United States Court of Appeals that has looked at the issue of whether RCRA enforcement by a delegated state was precluded by CERCLA held that it was not.

²⁶⁹(...continued)

weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations" particularly when reconciling conflicting policies. *Id.* at 842-44.

²⁷⁰Corrective Action Management Units and Temporary Unit; Corrective Action Provisions Under Subtitle C, 58 Fed. Reg. 8658, 8660 (1993).

²⁷¹*Supra*, pages 14-16.

*United States v. Colorado*²⁷² concerned cleanup at "Basin F" on the Rocky Mountain Arsenal, a U.S. Army facility. The Army had started an RI/FS for "Basin F" when it was a non-NPL site. It was later listed on the NPL. The Army argued that its cleanup under CERCLA preempted the state enforcement of its EPA-delegated RCRA authority. The court found the Army's arguments unpersuasive. The court held the statutory schemes of RCRA and CERCLA were not mutually exclusive and the State, since it was delegated authority under RCRA, could enforce its RCRA statute.²⁷³ The court reversed the district court which had held that after "Basin F" was listed on the NPL, CERCLA § 113(h)²⁷⁴ divested it of pre-completion review of the remedial action underway at "Basin F." The district court noted that there was legislative history to the contrary, but since the statute was clear, the legislative history was irrelevant.²⁷⁵ The

²⁷²No. 91-1360, 1993 U.S. App. LEXIS 6950 (10th Cir. Apr. 6, 1993)[hereinafter LEXIS].

²⁷³This opens a CERCLA cleanup to a collateral attack under RCRA corrective action. Of course, the potentially responsible parties and the lead agencies would only have to be concerned with the state in this case, except for some very troubling dicta. The court in discussing the RCRA citizen suit provision, opined that provision was available, except for the imminent danger portion, to enforce RCRA corrective action whether or not a CERCLA cleanup was underway. The court went on to say that the state could have arguably relied on the citizen suit provision, but since it was not doing so in this case it would not reach this issue, *see, Id.* at *36-40. This could eviscerate CERCLA § 113(h) (42 U.S.C.A. § 9613(h) (West Supp. 1993)) opening up CERCLA removal and remedial actions to citizen suit collateral attacks under the right circumstances. Because of the RCRA deferral policy this will primarily be a concern for federal facilities.

²⁷⁴42 U.S.C.A. § 9613(h)(West Supp. 1993), which concerns the timing of judicial review.

²⁷⁵*United States v. State of Colorado*, 33 E.R.C. 1585 (D. Colo. 1991). The judge's frustration with this situation is clear in that opinion. The frustration felt on both sides
(continued...)

circuit court found that judicial review was precluded if the State was challenging the remedial action; however, the State was not challenging the remedial action, it was just trying to enforce its RCRA delegated corrective action authority. The circuit court remanded the case to the district court to vacate its order to prohibit the State from taking action to enforce its compliance order under its RCRA delegated statute.

The circuit court relied on CERCLA § 302(d),²⁷⁶ a savings provision, and § 114(a),²⁷⁷ the provision dealing with conflicts with other laws provision, to infer that Congress intended for RCRA delegated authority to be exercised. The court stated these clauses "expressly preserved" the State's authority to take action.²⁷⁸ The court held CERCLA did not implicitly repeal "RCRA's enforcement provision given CERCLA's

²⁷⁵(...continued)

of this issue is also reflected in a Congressional hearing concerning the Federal Facilities Compliance Act. *Cleanup at Federal Facilities: Hearings on H.R. 3781, H.R. 3782, H.R. 3784, and H.R. 3785 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 530-33, 539-664 (1988). In that hearing the congressmen were concerned with the DOJ position in its litigation concerning Rocky Mountain Arsenal. They indicated that RCRA corrective action and CERCLA were both applicable, *Id.* at 530-33, and even attached excerpts from the legislative history of Superfund, *Id.* at Exhibit L, pp. 623-28. On the other side was the DOJ attorney and the EPA representative who wanted to know what to do when two different regulators gave conflicting directions, *Id.* at 532. The reply from the Congressman was, "Well, I am sitting on the side of the dais where you get to ask the questions." *Id.*

²⁷⁶"Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants...." (42 U.S.C.A. § 9652(d)(1983)).

²⁷⁷"Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." (42 U.S.C.A. § 9614(a) (1983 & West Supp. 1993)).

²⁷⁸LEXIS, *supra* note 272, at *32.

clear statement to the contrary."²⁷⁹ The court also found that placement of "Basin F" on the NPL had no bearing on the case. The court found that §120(a)(4),²⁸⁰ which says that State law applies to non-NPL sites, did not exclude states from enforcing their RCRA delegated corrective action authority when a site was placed on the NPL. If Congress had meant that result it would have said so explicitly. On the contrary, § 120(i)²⁸¹ expressly preserved the obligation to comply with RCRA corrective action.²⁸² The Army argued that the participation of the State was through the Applicable or Relevant and Appropriate Requirements (ARARs)²⁸³ process. The court repeated that was not the exclusive remedy available to the State, because of CERCLA § 302(d) and § 114(a). The Army also argued under CERCLA § 121(e)(1) state permits were not required. The court noted the conflict with RCRA, but said since the State was not requiring a permit in this case, it did not have to reach that issue.²⁸⁴ While the court found that the State could enforce its RCRA corrective action authority, it did not tell the Army how to deal with conflicting guidance from two regulators.²⁸⁵

²⁷⁹*Id.* at *41.

²⁸⁰42 U.S.C.A. § 9620(a)(4)(West Supp. 1993).

²⁸¹42 U.S.C.A. § 9620(i)(West Supp. 1993).

²⁸²LEXIS, *supra* note 272, at *45.

²⁸³Crudely stated, these are the clean up standards that apply to a CERCLA site. For a definition, *see* 40 C.F.R. § 300.4 (1992).

²⁸⁴LEXIS, *supra* note 272, at *51.

²⁸⁵Underlying this decision is the slowness of the cleanup at Rocky Mountain Arsenal. This was particularly apparent in the district court's opinion *Colorado v.*
(continued...)

EPA, on the other hand, in trying to make sense of this overlap had issued its federal facilities listing policy.²⁸⁶ As stated earlier, EPA had relied on CERCLA § 122(e)(6) to say starting a RI/FS subordinates state enforcement of its EPA-delegated RCRA corrective action authority to the on-going federal CERCLA cleanup. The court gave this policy letter no deference whatsoever. It said this was "'contrary to the plain and sensible meaning' of [42 U.S.C. §§] 9622, 9614(a) and 9652(d), and, when applied to federal facilities, 9620, we do not afford it any deference."²⁸⁷ The United States asked the court to reconsider its decision *en banc*, but the request was denied. The United States has until September 1993 to decide whether to appeal to the Supreme Court.

²⁸⁵(...continued)

United States Department of the Army, 707 F. Supp. 1562 (D. Colo. 1989). In that opinion dated February 24, 1989, the judge wrote, "I note that the instant CERCLA action has been pending since December 1983, and despite the court's frequent cajoling, the parties have constantly delayed efforts to bring the case to trial; nor have they proposed an overall plan for clean up as contemplated by CERCLA." *Id.* at 1568. The judge also felt, except for the state, there was "no vigorous independent advocate for the public interest." He stated, "As long as both [EPA and the Army] are represented in the Arsenal CERCLA actions by the same Justice Department lawyers who have professed that they have no conflict of interest, even though one of their clients is a plaintiff and another a defendant in the same consolidated action, there is no vigorous independent advocate for the public interest." *Id.* at 1570. Previously he had stated, "Moreover, once the Army has satisfied what it considers to be its cleanup obligations, the State is responsible to its citizens if the process has not been thorough. Having the State actively involved as a party would guarantee the salutary effect of a truly adversary proceeding that would be more likely, in the long run, to achieve a thorough cleanup." *Id.* The circuit court noted this portion of the district court opinion, LEXIS, *supra* note 272, at *20.

²⁸⁶The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities, 54 Fed. Reg. 10520 (1989). See *supra* text accompanying notes 256-267.

²⁸⁷LEXIS, *supra* note 272, at *57.

PREEMPTION

The cases of *Hancock v. Train*,²⁸⁸ *EPA v. California State Water Resources Board*,²⁸⁹ and *California v. U.S.*²⁹⁰ stand for the proposition that federal agencies can be subject to state regulation when there is "a clear congressional mandate," 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'²⁹¹ Even then state law must give way when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²⁹²

The question is whether or not there can be preemption of RCRA corrective action by CERCLA when there was deliberate overlap. In looking at preemption issues the seminal case is *Florida Lime & Avocado Growers, Inc. v. Paul*.²⁹³ In this case the Supreme Court set forth a three-part test to determine if a state law had been preempted by a federal law. In this case the plaintiffs were engaged in the business of growing, packing, and marketing avocados in Florida. They brought suit in federal court to enjoin the state officers of California from enforcing a statute which prohibited the transportation or sale of avocados in California containing less than 8% of oil by weight,

²⁸⁸426 U.S. 167 (1976).

²⁸⁹426 U.S. 200 (1976).

²⁹⁰438 U.S. 645 (1978).

²⁹¹426 U.S. at 179.

²⁹²*Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), *citing* *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

²⁹³373 U.S. 132 (1963).

against Florida avocados that were certified as mature under federal regulations. It is interesting to note these were federal regulations established by Florida avocado growers. The plaintiffs argued that the statute violated the supremacy clause, equal protection, and the commerce clause.²⁹⁴ The court held that the statute was not invalid under the supremacy clause as there was no actual conflict between the two schemes of regulation, and there was no evidence that Congress intended to occupy the field. The Court also held that the statute did not violate the equal protection clause but remanded the case on the commerce clause issue.²⁹⁵

In looking at the preemption issue the Court stated, "A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."²⁹⁶ The next test is whether there is an explicit declaration of congressional design to displace state regulation.²⁹⁷ The third test was whether preemption was implied. In making this comparison the court found that the facts did not meet any of these tests so the state statute was not preempted by the federal

²⁹⁴*Id.* at 134-35.

²⁹⁵*Id.* at 136-37.

²⁹⁶*Id.* at 142-43.

²⁹⁷*Id.* at 143.

regulations. Not only federal laws but federal regulations can preempt state laws,²⁹⁸ so any preemption analysis must also look at the federal regulations as well.

In CERCLA there is no explicit preemption. On the contrary, Congress attempted to make it clear that there would be no preemption. Under CERCLA § 120(i)²⁹⁹ corrective action under RCRA was not preempted.

Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act (including corrective action requirements).

Turning to RCRA it also has a section concerning retention of state authority.³⁰⁰

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.³⁰¹

Once again this is the idea of a national minimum standard to prevent companies from playing the states off against one another.

While the RCRA waiver of sovereign immunity is very broad, as we have seen, it does not appear with even the most elastic version of these provisions that a local

²⁹⁸*Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), *citing* *Capital Cities Cable, Inc. v. Crisp*, 471 U.S. 707, 713 (1985), *Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153-54 (1982), and *U.S. v. Shimer*, 367 U.S. 374, 381-83 (1961).

²⁹⁹42 U.S.C.A. § 9620(i) (West Supp. 1993).

³⁰⁰Section 3009 (42 U.S.C.A. § 6929 (1983 & West Supp. 1993)).

³⁰¹*Id.*

requirement "respecting control and abatement of solid waste or hazardous waste disposal and management"³⁰² (and not arising under RCRA or a delegated state's laws and regulations), could be said to be a requirement of RCRA that would fall within CERCLA § 120(i). The area of overlap is between RCRA corrective action and a CERCLA cleanup at an NPL site.

If there is not explicit preemption the next issue is, is there implied preemption, would the purpose of CERCLA be interfered with if a federal facility complied with state ordered RCRA corrective action. The case of *Northern States Power Company v. Minnesota*³⁰³ gives several factors to look at to determine if there is implied preemption.

Key factors in the determination of whether Congress has, by implication, preempted a particular area so as to preclude state attempts at dual regulation include, inter alia: (1) the aim and intent of Congress as revealed by the statute itself and its legislative history, [citations omitted]; (2) the pervasiveness of the federal regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency, [citations omitted]; (3) the nature of the subject matter regulated and whether it is one which demands 'exclusive federal regulation in order to achieve uniformity vital to national interests.' [citations omitted]; and ultimately (4) 'whether, under the circumstances of (a) particular case (state) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [citations omitted].³⁰⁴

³⁰²Section 6001 (42 U.S.C.A. § 9661 (1983 & Westlaw 1993)).

³⁰³447 F.2d 1143 (8th Cir. 1972), *aff'd w/o opinion*, 405 U.S. 1035 (1972). The issue in this case was whether the United States had the sole authority to regulate radioactive waste from nuclear power plants to the exclusion of the states. The court answered this question yes.

³⁰⁴*Id.* at 1146-47.

In looking at the instant situation, the aim and intent of Congress is to cleanup sites expeditiously with liberal amounts of input from the affected states. There is also the recurring theme of wanting to treat federal facilities like any other entity. The federal regulatory scheme is pervasive, though, with plenty of room for state action. The nature of the subject matter is one of traditionally state police power. Finally, if state law is preempted it will be because it is an obstacle to the accomplishment of the full purposes and objectives of Congress. Only when the state impedes a clean up would it seem that Congress' purposes would be frustrated. But this does not appear likely since the whole framework of federal environmental laws is one of a minimum standard, or floor, which the state can make more strict. The analysis becomes very fact-specific. It appears that in reality the only argument under traditional preemption analysis is impossibility, which the courts will rarely find.

There are several situations where conflicts could arise. One is if a federal facility is doing a CERCLA cleanup and the state chooses not to participate using the federal procedure (keeping in mind that CERCLA is a non-delegable statute). Another is if the site is on the NPL, with EPA as the lead agency,³⁰⁵ then the state will have to participate in the cleanup under CERCLA (except for RCRA corrective action in a delegated state). If the state is a RCRA corrective action delegated state, after *Colorado v. United States*, both state directed RCRA corrective action and EPA directed CERCLA cleanup apply. However, that case stated a truism. If there is an actual conflict, which did not appear in that opinion, CERCLA should prevail under the supremacy clause.

³⁰⁵Exec. Order 12580, 52 Fed. Reg. 2923 (1987).

If the site is not on the NPL, then the issue becomes more difficult. Under § 120(a)(4) Congress has said that state laws apply; however, Congress has also said that "no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President."³⁰⁶ The initiation of the RI/FS is what triggers this clause. The President has delegated his authority to respond to the regulated federal agency at non-NPL sites.³⁰⁷ The start of an RI/FS would start the CERCLA cleanup. EPA, at least, in its federal facility listing policy has concluded that federal cleanup under the more general § 122(e)(6) would give way to the state directed action under the more specific waiver found in § 120(a)(4). If the federal agency has not started a cleanup or does not follow the statutes as written, state rules will apply.

The argument that may become even more important to the federal regulatee is the argument of discrimination. Under both CERCLA and RCRA states are not allowed to discriminate against federal agencies. Under CERCLA § 120(a)(4)

... The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.³⁰⁸

³⁰⁶42 U.S.C.A. § 122(e)(6) (West Supp. 1993).

³⁰⁷Exec. Order 12580, 52 Fed. Reg. 2923 (1987).

³⁰⁸Section 120(a)(4) (42 U.S.C.A. § 9620(a)(4) (West Supp. 1993)).

This applies to state laws that affect non-NPL sites. Under RCRA § 6001 in waiving sovereign immunity it says, "in the same manner, and to the same extent, as any person is subject to such requirements."³⁰⁹

The bottom line is that it will be up to the federal agency counsel to know what the local laws in a state are. They will have to follow the regulatory process. As always, it will be incumbent on federal agency environmental personnel and their counsel to maintain a good relationship with the state regulators and the EPA regulators. And most importantly, it will be important to have good communication to avoid having to cleanup a site more than one time.

CONCLUSION

As public concern for the environment increased, so has the role of the federal government. In this area of traditionally local concern the federal government has attempted to establish a minimum standard and return pollution control programs to the states. Federal facility participation has gone from voluntary cooperation to, in most cases, being treated like any other regulated industry. The policy choice made long ago was that federal facilities would be subject to non-discriminatory "requirements" of state regulation. Sovereign immunity in this area has been almost completely waived. Congress has taken the lessons it has learned from the courts to rewrite the waivers so that federal facilities would be treated like everyone else.

When a person responsible for compliance with hazardous waste or constituent cleanup at a federal facility asks what laws apply and who is responsible for enforcing

³⁰⁹42 U.S.C.A. § 6961 (1983 & Westlaw 1993).

them, the answer varies. If the facility is subject to RCRA corrective action, the state has been delegated the RCRA corrective action program, and RCRA corrective action is the preferred approach, state hazardous waste law applies and the state has primary oversight authority. Criminal sanctions are the only enforcement tools not available against the federal agency.

If RCRA corrective action is not the preferred approach to cleanup, or a CERCLA cleanup is underway, the issue becomes complex and the analysis becomes very fact specific. The law that applies will depend on what the state, EPA, and even the regulated federal agency are saying and doing. If the site is on the NPL then EPA is the lead agency. If the site is not on the NPL the responsible federal agency becomes the lead agency, however state laws can apply. Because the laws overlap there are several important principles. The most important principle is to have a good relationship with the regulators. The second principle is to bring the state and EPA into the cleanup process early and document their participation. It is imperative to try and reach a consensus early on what the rules will be for cleanup at that site and what roles the parties will have. This can be formalized in an interagency agreement.³¹⁰ The problem with these agreements are that they can delay cleanup while the parties argue

³¹⁰An interagency agreement is required between EPA and the regulated federal facility for an NPL site under CERCLA. It includes all remedial action at the facility (CERCLA § 120(e)(2), 42 U.S.C.A. § 9620(e)(2)(West Supp. 1993)). The state should be a full signatory to this agreement, if it will, at a RCRA facility. See Letter from J. Winston Porter, Asst. Adm., Office of Solid Waste and Emergency Response, EPA, to EPA Regional Administrators, Subject: Enforcement Actions Under RCRA and CERCLA at Federal Facilities (Jan. 25, 1988), *reprinted in* EPA, FEDERAL FACILITIES COMPLIANCE STRATEGY Appendix K, 10 (1988).

over the process. It will become imperative for the federal practitioners to understand EPA and state regulators, and their agenda. Flexibility and compromise will become the key to getting cleanups done quickly and more efficiently, but trust also becomes critical. There is more than enough work for everyone to do without using resources to litigate these questions. *United States v. Colorado*³¹¹ is troubling because it opens a CERCLA cleanup to collateral attack. If *United States v. Colorado* stands it will make CERCLA settlements more difficult and will probably lengthen the amount of time that it takes to clean up a site. While this could apply to any CERCLA cleanup, it is mainly a federal facility problem because of EPA's RCRA deferral policy.

Close cooperation among the regulators and the regulatee is imperative. The federal facility must ensure that it is following the statute under which it wishes to be regulated. Any conflicts that are not easily resolved need to be elevated, so that the appropriate policy-makers can know the problems that are being encountered and how they are affecting cleanups. Finally, if the situation becomes intractable, the answer will have to come from the courts through litigation.

³¹¹No. 91-1360, 1993 U.S. App. LEXIS 6950 (10th Cir. Apr. 6, 1993).